BASIC PRINCIPLES OF CONTRACT DRAFTING

COURSE MATERIALS

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PART 1: GLOSSARY OF CONTRACT TERMS

Technical and Specialized Vocabulary

Here are a few terms that you might encounter in the course of the discussion, along with some other terms that might be of use. Please remember, these are not technical definitions. Strictly technical definitions would require us to spend more time on the details of various legal systems than is useful for our purposes. Rather, these are general descriptions of the sense of the various terms.

ADR – this is short for alternative dispute resolution, or ways to resolve disputes outside of the courtroom. The term typically encompasses negotiation, mediation and arbitration.

Assignment - the transfer of rights or duties by the assignor to the assignee. This may occur only by agreement or by operation of law, for example, when someone dies or when a company is bankrupt.

Battle of the Forms – a common business situation where business parties establish their relationship by sending standardized forms to each other. Often, the terms of the forms do not agree, and it can be difficult to tell if the parties have concluded a contract, and if so, what the terms of that contract are.

Boilerplate – the clauses, generally appearing at the end of a contract, which are used to settle general matters such as choice of law, notice procedures, amendment procedures, interpretation issues, dispute resolution mechanisms and the like. The term also has a more general definition meaning any standardized or preprinted form for agreements. The term is also used to talking about the 'small print'. For example, the small print after a TV commercial about a product or contest which list all the various restrictions.

Choice of Law – often, the parties to a contract will specify which rules of law should be used to resolve any dispute between them. Particularly in international transactions, the choice of law can be a significant point of negotiation among lawyers. Choice of law (what legal principles will be used to resolve the dispute) should be distinguished from choice of forum (where the dispute should be resolved) and choice of dispute resolution method (litigation or some form of ADR).

Common Law – this term, when contrasted with Civil Law, refers to legal systems which have their origin in the British legal system. The legal system of the United States is from the common law tradition. Within the U.S. legal system, the term is used to distinguish judge-made law from statutes (made by legislatures) or regulations (issued by the executive branch of government). It may also refer to the

method of analysis that a court uses to interpret a statute, regulation or other rule of law, and may include the concept of precedent.

Condition Precedent – an event that must happen before a contract or a contractual obligation goes into effect.

Condition Subsequent - a happening which terminates the duty of a party to perform or do his/her part.

Consideration – a common law concept which requires (in essence) that a promise be part of an exchange to be enforceable as a contract.

Contracts of Adhesion – standardized contracts, usually presented on a take-it-or-leave-it basis, to parties of unequal bargaining strength.

Covenant – this term used in a contract means a promise which, if not carried out, will carry legal consequences. Often, covenants are divided into Affirmative Covenants (the things the promisor agrees to do) and Negative Covenants (the things the promisor agrees not to do).

Cure Periods – often, when a Default occurs under a contract, the obligor may have a certain period of time to cure the Default before the obligee is allowed to exercise Remedies. Sometimes the obligee is required to give notice before the time begins to run (in which case lawyers will speak of "Notice and Cure Periods"). Notice and Cure Periods are sometimes more casually referred to as "grace periods."

Default – the circumstances where an obligor under a contract is considered to be in breach of the contract. In formal written contracts, Defaults often include failure of a Representation or Warranty to be true when made, failure to perform any Affirmative or Negative Covenant, insolvency or bankruptcy, as well as other enumerated situations tailored to the specific circumstances.

Equity – this term, which is often used to mean fairness, also has a more technical legal meaning. It used to be that the Common Law system was rather rigid, and in order to obtain relief, a litigant had to fit into a limited class of situations. Sometimes, this rigidity produced results that seemed very unfair. Eventually, a second type of court was created to hear those cases -- those where there was "no remedy at law" but "equity" demanded a remedy. In most jurisdictions, the separate court systems, consisting of "Courts of Equity" have been abolished, but in many areas the distinction between cases sounding in "law" and those sounding in "equity" persist. In other contexts, "equity" refers to the amount by which a property's value exceeds the debt (or Liens) against it. The legal concept of equity in this sense is not known to the civil law (Romano-Germanic) system, and can cause problems. For

example, in a US or UK contract, "“equitable remedies" does not mean “fair, reasonable, and just” but refers to remedies applied under the common law concept of equity. In practice, this means remedies other than plain compensation – e.g., a court order for specific performance of the contract, or an injunction.

Estoppel – an equitable concept that prevents a party from raising an argument when the party has acted unfairly, fraudulently, or otherwise inappropriately. (EU equivalent: “legitimate expectations”).

Events of Default – When a Default remains uncured under any applicable Notice or Cure Period, contracts typically provide that an Event of Default has occurred. Once an Event of Default has occurred, the obligee may generally pursue Remedies.

Excuse - something that forgives performance and bars enforcement of the contract. If performance of a contractual obligation is excused, this relieves the nonperforming party of liability.

Execution - (1) signing; the parties execute the contract by signing it; (2) performance; the parties may execute a contract by carrying out their obligations and duties; (3) enforcement of a judgment, order or writ (execution of judgment); (4) in criminal law, carrying out a death sentence. This word is a good example of polysemy – words with multiple meanings – in legal language.

Force Majeure – an “act of God” which prevents one party from performing the obligations owing under a contract. Commonly such things as war, riots, earthquakes, floods, strikes and the like are included. The common law generally takes a stricter approach to force majeure than civil law legal systems.

Impracticability – A legal doctrine closely related to Force Majeure. If some unanticipated event makes performance of the contract unusually burdensome, some legal systems will allow a party to be excused from the contract under the doctrine of impracticability. Different legal systems have varied requirements for invoking this doctrine.

Indemnity – an agreement in which one party agrees to reimburse another party if it is held liable. An indemnity is in the nature of a guaranty, but typically is used when the party offering indemnity has some interest in, involvement with, or control over the events leading to liability. Indemnity clauses are often found in commercial contracts, and may be coupled with “hold harmless” provisions. In a “hold harmless” provision, the first party says that they will not hold the second party responsible for certain actions, even if the first party might otherwise have the right to do so under applicable law.

Independent Contractor – this term is usually used to contrast with "agent" or "employee." The basic idea is that an independent contractor is free to do only that work that it contracts to do, in the way it contracts to do it. In contrast, an agent or an employee is subject to the discretion or control of the party for whom they are working. The chief importance of the concept is in the context of vicarious liability -- a person is generally not responsible for the misdeeds of its independent contractor, while it may be liable for the misdeeds of its agents or employees.

Intellectual Property – right given by law to a person in connection with intellectual, industrial or artistic work. Intellectual Property includes, among other things, patents (inventions), designs (graphics), trademarks (names or marks used to identify goods) and copyrights (rights of authorship). Due to the information revolution, the nature and extent of information which is protected as intellectual property is a rapidly changing field.

Joint Venture – a very broad term used in many different contexts. In its general sense, it means more than one person getting together for the purpose of making a profit in a speculative enterprise. In this regard, it is very similar to a Partnership, but it tends to be used for limited undertakings. Often, particularly in reference to central and eastern Europe, American lawyers use the term to refer to profitable activities done in cooperation with foreign governments or foreign nationals.

Letter of Credit – a financing device whereby a bank, at the request of a customer, agrees to pay a beneficiary upon satisfaction of certain conditions. Typically, the conditions are limited to presentation of specified documents. The bank makes the agreement as a service to its customer, and will seek reimbursement from its customer if it is required to make payment under the terms of the Letter of Credit. Letters of Credit are often divided into "Documentary Letters of Credit," which are often used as a normal means of payment in international trade, and "Stand-By Letters of Credit" which are more in the nature of a bank guarantee.

License – this term has many meanings, depending on the context. Its general sense is permission to use the property of the licensor. It is often used in the context of Intellectual Property to mean the agreement by which the owner of the Intellectual Property gives someone else permission to use it, typically for a royalty or a fee. License agreements are often used to transfer technology from one party to another. Absent the License, the licensee's use of the Intellectual Property would be against the law. The term is also used in completely different contexts. For instance, a movie theatre ticket is often characterized legally as a "License."

Lien – a creditor has a Lien on a piece of property owned by a debtor when the creditor has a contingent claim to that property. Sometimes, the debtor voluntarily gives the creditor a Lien as a form of security for payment; other times the creditor receives the Lien by operation of law. Usually non-payment of the debt, or an Event of Default under any contract creating the debt, allows the creditor to Foreclose on the Lien.

Liquidated Damages – when parties to a contract settle in advance the amount of damages which will be available should one party fail to perform. Liquidated damage clauses are generally subject to close scrutiny under U.S. and U.K. law. This is also sometimes called a Penalty clause.

Partnership (including General Partnership and Limited Partnership) – a voluntary (unincorporated) association of two or more persons for the purpose of making a profit. In a general partnership, all of the partners are personally liable for the debts of the partnership, and have a management role. In a limited partnership, general partners exist alongside limited partners. General partners are personally liable and have a management role; limited partners are not personally liable and do not have a management role. Partnership as a concept is not known or recognised in all legal systems.

Recitals – in a formal written contract, the clauses that explain who the parties are, and their purposes for entering into the contract (i.e., background). Sometimes called "Preamble".

Remedies – the actions that can be taken upon an Event of Default. Sometimes an aggrieved party can take action on its own. This is often referred to as "self-help." Other times, the term "remedies" is used to describe the court procedures and decisions that are available to help an aggrieved party. (See "Cure").

Representations and Warranties – statements made by a party in a contract which, if untrue, carry legal consequences. Sometimes representations and warranties need not be explicitly stated by the parties, but instead are implied by law.

Rescission - cancellation of a contract by mutual agreement of the parties prior to its performance.

Risk of Loss – who bears the risk if the goods covered by a contract are damaged or destroyed. Risk of loss is particularly important when goods are being transported long distances between the seller and the buyer. If the seller bears risk of loss during carriage, and the goods are destroyed in transit, the seller has a responsibility to provide substitute goods. If the buyer bears risk of loss, the buyer generally must pay for the goods, even though they never arrive. Often parties cover

the risk of loss with insurance, so the ultimate loss may rest with an insurance company. In practice, areas of risk are dealt with by INCOTERMS and insurance (or re-insurance).

Secured Transaction – a voluntary transaction in which a debtor gives a creditor a Lien on its property to secure payment or performance of an obligation.

Security – this particularly confusing term is used in at least two very different contexts. First, it is used to refer to property that is subject to a Lien. The property is "security" for the debt secured by the Lien. A more precise term for this concept would be "collateral." "Security" is also used in the context of investment securities – such as stocks, bonds, and other evidences of ownership or indebtedness which are regularly traded.

Severability - the characteristic of a contract that allows for removal of duties or portions that are incorrectly or illegally drawn up. The parties may agree that incorrect, impractical, or illegal portions be severed from the agreement and replaced by language that best reflects the intent of the parties and comes closest to the business objective of those severed portions. Severance allows the remainder of the contract to be valid and enforceable.

Specific Performance – a court orders specific performance when it requires a party to carry out its obligation, rather than merely paying damages. Specific performance is an extraordinary remedy, that is to say not usually available, under American or U.K. contract law. It is a good example of an equitable remedy (see Equity).

Tender - is a bid or formal offer. A proposal of terms is extended generally ('put out for tender' or 'competitive bidding'), inviting prospective parties to respond by making a bid or tender. Do not confuse with **legal tender**, which is money.

Unconscionability – a U.S. concept which has its roots in Equity, and which allows a court to refuse to enforce a contract or a portion of a contract which it considers to be particularly unfair.

Void - is absolutely null, empty, having no legal force, and incapable of being ratified. In contracts it refers to an attempt at formation of contract which is equivalent to no contract at all.

Voidable is capable of being voided, or later annulled. If a contract is formed but voidable, it may either be ratified (US) or confirmed (UK) by conduct or else it may be voided by one of the parties. Once ratified, the promise is enforceable. If it is voided, it is unenforceable.

PART 2: COURSE TEXTBOOK

CHAPTER 1: Process of Contract Drafting: Elements of Effective Contracts

Section A: Fundamental Policies and Values of Contract Law

Introduction

While a course on contract drafting may seem dry and technical, there are a number of strongly held ideological values underlying contract law and its rules are motivated by conscious and deliberate public policy. Understanding these policy themes can help a practitioner appreciate the goals and assumptions underlying the legal rules involved in drafting contracts.

Freedom of Contract

The power to enter contracts and to formulate the terms of contractual relationships can be regarded as an integral part of personal liberty. For instance, this respect for the exercise of personal liberty is the policy reason underlying the rule in contracts that one may not be bound to a contract absent that person's assent. In the United States, the power of contracting is understood to be one of the innate rights originating in the people and guaranteed by the Constitution. Liberty of contract also enforces individual rights to hold and deal with property. Like other liberties, freedom of contract is limited by corresponding rights held by other persons and by the state's legitimate interest in appropriate regulation. Such regulation may be directed, for example, at protecting weaker parties from the free exercise of overwhelming contractual power by stronger dominant parties. The ideological basis of contract freedom is reinforced by economic principles, as well. For example, economic intercourse is most efficient when its participants desire it and are free to bargain with each other to reach mutually desirable terms.

Morality of Promise

There is also a longstanding moral dimension of contract in law: that there is an ethical as well as legal obligation to keep one's promises. Thus, contracts should be honoured not only because reliability is necessary to foster economic interaction, but simply because it is morally wrong to break them. Although it often seems that the role that this basic moral value plays in contract law is subtle, society and courts are not indifferent to the ethical implications of dishonouring contracts—especially in the case of deliberate breaches that are motivated by bad faith.

Accountability for Conduct and Reliance

Another fundamental value of contract law is that a person should be held accountable for words or acts reasonably manifesting intent to contract, and that the

other party, acting reasonably, should be entitled to rely on that manifestation of assent. An objective test of reasonableness is thus often used to evaluate a party's conduct. For example, a party's intent in entering into a contract is often evaluated in light of the person's state of mind as made apparent to the outside world (as opposed to the true and actual state of mind of the party at the time). The value of protecting reasonable reliance is pervasive in contract law.

One corollary to this principle is that a person who has entered a contract has the right to rely on the undertakings that have been given; if those undertakings are breached, then the law must enforce them.

Another corollary to this principle is that, when parties in numerous specific situations feel secure in relying on promises, the expectation arises in society as a whole that contracts can be relied on and that there is legal recourse for breaches. This concept of *security of contracts* is indispensable to economic interaction. Without it, there would be little incentive to make or rely upon contracts.

Social Justice and Protection of the Underdog

Modern contract law is also sensitive to the imposition of contractual obligations through coercion, dishonesty or lack of meaningful choice resulting from power imbalance.

Fairness

Contract law has some express doctrines that address questions of unfairness, such as doctrines of unconscionability and good faith.

Economic Aspects of Contract Law

Because contracts are concerned with economic exchanges, contract law must inevitably be economic in its purpose. After all, the goals of contract law include facilitating trade and commerce, regulating the manner in which people deal with each other in the marketplace, and enforcing commercial obligations. In the United States, the basic philosophy of contract law has been capitalist and geared toward the ideal of a free market.

Section B: Sources of Contract Law

Introduction

Contemporary contract law seeks to respect free markets, regulate the freedom of powerful contractors, safeguard the rights of weaker parties, and affect social policy concerning matters of consumer protection, employee rights, and business ethics.

The English and American legal systems developed a general doctrine of contract law through analysis of court decisions, from which they extracted a set of coherent and well-defined rules, which were then used as a basis for constructing more abstract principles. These general principles formed a framework for organizing and linking the rules into a body of doctrine. Thus developed the classic theory of contract law, which stresses facilitation of contractual relationships and favours an objective approach. More recently, contract law incorporates a broader context that considers not merely the applicable doctrine but also such other factors as economic, relational and ethical perspectives. Contract law has evolved to reflect a sophisticated mix of doctrine, policy and process.

Comparing the Civil and Common Law Approaches to Contract Law

The system known as the "Common Law' developed in England, and became adopted in Britain's foreign territories. Thus, the common law of England has remained the basic legal system in most of Britain's ex-colonies, including the United States. Therefore the term "common law", used in the broadest international sense, designates a country whose legal system is based on the common law of England. On the other hand, continental Europe developed civil legal systems derived from Roman law. The Civil systems have a long tradition of comprehensive codification and tend to focus on their codes and scholarly commentary as a source of law. In contrast, common law systems tend to emphasize more strongly the role of the judge in development of the law.

The Meaning of "Common Law"

In addition to characterizing the English and American legal systems on an international level, the term "common law" refers to those portions of law based upon decisions of the courts (as distinct from those created by legislation). In common law countries, many statutes govern aspects of contracts. These statutes tend to codify the common law by taking rules and principles already developed by judges and putting them into statutory form, in order to clarify the law or make it more accessible. Such statutes may also reform, alter or modernize the common law rules, or create new rules to deal with problems not yet addressed by the courts. Despite considerable legislative attention to contracts, the field is still regarded as part of common law because judge-made rules continue to predominate.

Commercial Codes

Civil law countries have long used codes in their legal systems. Although the United States has a common law legal system, it has enacted a commercial code called the Uniform Commercial Code (UCC) to apply to certain specific types of commercial transactions. The UCC is not applicable to all contracts but does cover sales and leases of goods, negotiable instruments and documents, and security interests in personal property.

CISG

The United Nations Convention on Contracts for the International Sale of Goods (CISG) applies to international sales transactions involving countries that are signatories to the treaty. The Convention covers only issues of contract formation and the rights and duties of the parties. It does not address matters touching on contract validity, such as fraud, or illegality. It also excludes product liability issues.

Judicial Opinions

A fundamental principle of justice is the equal treatment of people in like situations. As common law developed, it became established practice for court decisions to be recorded so that they could be used as the basis for resolving later cases. Thus, a court decision not only settled the dispute between the immediate parties, but it also formed a rule to be followed in the next case involving similar facts. This allows for efficiency in the administration of justice, enables people to predict case outcomes more accurately, and serves to provide justice in the sense of equality of treatment before the law. The principle that a judicial decision creates a rule of law, binding upon later cases with similar facts, is known as the doctrine of precedent (in Latin, *stare decisis).* This doctrine is peculiar to common law. Although civil systems accord some weight to judicial precedent, they rely primarily on comprehensive codes and scholarly commentary as a source of legal rules. Under the civil systems, court decisions are typically regarded as an exercise in applying the law rather than the process of creating law. European judges thus generally see their role as dispute resolution rather than law-making. Hence court decisions in civil law countries tend to be short, not very analytical, and fact-based. Court opinions in common law countries, on the other hand, typically include substantial analysis in which the judge justifies and articulates the rationale for the rule and its application in the case. The statement of the court's rule and reasoning are the portion of the case that constitutes the precedent. Note that the Court of Justice of the European Communities is developing its own approach, combining elements from both common law and civil law systems. Its decisions affect laws in all Member States of the European Union.

Section C: General Writing Principles Applicable to Contract Drafting

Contract Drafting Process

Before writing, make sure you are clear about what parts the contract must include and what situations the contract must cover. Know what the parties in fact want. Precisely because this is an obvious point, it is often overlooked. Try outlining the contract to make sure that all the needed pieces are included and are organized logically.

The following guidelines may be helpful to you in beginning to draft a contract:

1. Reconcile yourself to writing many drafts of the contract to get it right. If you try to get all the details right in the first draft, you are likely to miss some important larger points.

2. Use clear, simple, businesslike language. Much progress has been made in this area, particularly in the areas of insurance and finance. Be careful not to slip back into overuse of "legalese". Use only the technical terms you need and define them if necessary.

3. Make each clause do one thing, not more. Outlines can help you here by breaking down the whole contract into a series of small points.

4. When revising, check for ambiguities:

   a. Check to make sure that you have used only one term for one item or person. Referring to the same person, item or concept by two different terms creates an ambiguity that invites misunderstandings later. If needed, include a definition section to define all your key terms, so that the reader understands any unusual terms.

   b. Check also to be sure that you have not used one term for several different items or persons. This can create unwanted ambiguities.

5. After polishing each clause in the contract, reread the document as a whole, looking for larger contradictions between parts of the contract, rather than wording problems within one clause. In your concern for the details, you may have overlooked some larger ambiguities.

6. Somewhere along the way, consult others. No one person can imagine all the pitfalls that the parties to any contract are hoping to avoid. No one person can imagine all the ways some reader can misconstrue a point.

<u>Importance of Multiple Drafts</u>

Always try to write more than one draft of any given legal piece. Let the first draft be creative, thorough and imperfect. Include everything you think necessary to the piece and all things that you think might be useful.

Then use second, third, fourth and other drafts for rewriting, revising, and polishing.

Guidelines for Revising Drafts of Contracts

Revising occurs after rewriting in the writing process. Revising concentrates on small-scale organization, sentence structure, transitions, paragraphing, grammar, and punctuation.

There are two things to remember about revising. First, do not revise while you write; this slows down both the writing and the revising processes. When you are writing, concentrate solely on your ideas, no matter how unpolished your writing may seem. Revise later. Second, when you revise, do it in stages. It is exhausting and inefficient to try to revise on every level at once. Use your time for revising to move from general writing problems to more specific ones.

1. ACCURACY: No amount of readability will replace accuracy, so make sure you check first for the content of each legal point. Ask yourself the following questions:

   a. Is the content accurately stated?
   b. Could any points be misunderstood because of ambiguity?
   c. Are irrelevant facts or other irrelevant information excluded?
   d. Are terms of art used correctly?
   e. Are key terms used correctly?
   f. Are paraphrases accurate?
   g. Are names of parties and their status correct?
   h. Are the citations accurate?

2. ORGANIZATION:

   a. Are paragraphs internally logical?
   b. Are there clear and precise transitions between paragraphs and sentences?

3. READABILITY:

   a. Are subjects and verbs close together?
   b. Are unnecessary modifiers eliminated?
   c. Are sentences not overly long?
   d. Are lists clearly structured?
   e. Are unnecessary prepositional phrases eliminated?
   f. Is the text generally concise?

4. STYLE:

   a. Is style consistent?

b. Is the tone and level of formality appropriate and consistent?

Try to give each of these categories your full attention for the specific amount of time you have parcelled for the task. After you have finished revising, you can move on to polishing the draft.

OTHER POINTS

General:
- No archaic terms (e.g., *hereinafter, hereby*)
- No legal pairs (e.g. *good and sufficient*)
- No Latin or foreign expressions (e.g., *bona fide*)
- Plain English, not legalese.

Precision: revising old text
Precise language provides firm standards for compliance and enforcement. It avoids vagueness such as '… provide reasonable assurance that…" But what is "reasonable assurance"? Perhaps this came from the words of a statute and the writer wants to avoid an interpretation. On the other hand, perhaps the writer wants to keep some interpretative freedom. This should be used as rarely as possible.

It is easy to create ambiguity or uncertainty by wrong punctuation, or wrong positioning in the sentence of certain words. For example, "Do it early in the first quarter" sets a shorter deadline than "Do it early, in the first quarter". Likewise, "We only recommend X" is far less strong than "We recommend X only".
Example: "Bids must be submitted by May 6". Is a bid submitted when sent (or received) – and by whom? And does "by" mean the start of May 6 or the end. Remember that Murphy's Law (in Russian *Zakon Podlosti*) applies!

When revising old text, be careful of accidental changes.
Plain-language translations risk introducing errors, e.g., "Confirmation shall be filed with this office" is more precise than "You must send us confirmation" (i.e., "file" is more precise than "send").
Plain-language revisions typically rearrange the text so that it is difficult to compare the old with the new. Read each sentence in the new version and mark its equivalent in the old text. Then decide what to do with old text that is unmarked. Two possibilities are;
- For small changes, use Track Changes to put a line through old words and introduce new ones.
- For large changes, set up two-column pages to display old and new text side by side.

Use the right verb
English has many ways to describe obligation, rights, prohibition and permission, freedom to choose and limits on that freedom. Here are some general guidelines:

To express…	*Use…*	*As in…*
Obligation (an order)	must, will do it	you must do it
Authorization (option)	may	you may do it
Prohibition (a ban)	must not/may not	you must not do it
Preference (a Recommendation)	should	you should do it
Intention (promise Imposing no requirement)	will	we will do it
No obligation	need not	you need not do it

Note: use verbs early in the sentence.

Don't use "shall"
The word "shall" has several meanings that are easily confused, even by lawyers. Use "must" if you want to show obligation, and follow the rules set out above. Keep "shall" for formal social occasions, e.g.:
Invitation: "Shall we dance?"
Response: "Wrong verb, baby!"

An alternative is to use the present simple tense, e.g. "The buyer agrees to…".

Prefer the singular
Although doing this may mean using "a", "an" and "the" more often, it can prevent uncertainty.

State requirements positively
Rarely use single negatives. Never use double negatives. Readers change negative statements to positive ones. This process needs extra work. It also allows misunderstanding. Each negative adds to the risk of error.
For example, better to say "can… only if", rather than "cannot…. unless", e.g. also: "must be no less than X" becomes "must be X or more", or "must be at least X" and, "does not exclude" becomes "includes"

Repeat key terms
In the case of a novel, it can be boring for the reader to see the same word repeated many times. In the case of a legal document, use of the same word with the same meaning is vital -– to avoid misunderstanding.

At the same time, avoid the opposite problem – using one term in several ways, especially legal terminology with more than one meaning (e.g., *sanction*).

Active voice
A serious problem in legal documents is overuse of passive verbs.
Documents are more readable in English if the passive is avoided.
Say again?!
You can make documents more readable in English by avoiding the passive.
OK, that's better! Try again?
Documents in English are more readable when the drafter avoids the passive.
Also OK!
If the English-language drafter avoids the passive, then the document becomes more readable.
OK, enough!
Passive verbs hide responsibility and make sentences longer than needed.

Possible cures

1. Put a subject (the "doer") before the verb.
2. Cut part of the verb
3. Use another verb.

Use the Passive rarely *
Two or three time a page is enough.
Use passives when the doer of the verb is obvious, unimportant, or unknown.
<u>Use *you* where possible</u>
Often, "you" is implied (understood).
Without "you" it is almost impossible to avoid passives, especially when stating obligations (imperatives).
The cleanest way to avoid passives is to lead with verbs as commands, e.g., *provide, avoid, include, perform.*
In this way it is even possible to avoid "you must".
Active verbs become natural for writers who ask the important question – *WHO does WHAT to WHOM?* (in grammar: SUBJECT + VERB + OBJECT).

Sentences *
<u>Keep sentences short</u>: average 15 words. If you go over 30, you run the risk that the reader may have a problem to follow you. As author, you are responsible for communicating your ideas efficiently and effectively.
Note: the exception when using bullet points and lists.

Keep subjects and verbs together: a short interruption between a subject and its verb will not slow readers much. But a long one will interfere with the communication process.
Keep compound verbs together: do not force readers to keep too much in their minds.
Put verbs early: let readers know what the sentence is going to do.
Put main clauses early: first generalize, then qualify.
Rearrange long sentences: use punctuation surgically.

Parallelism *
Look for grammatical parallelism: help your reader by being consistent.
Clarify comparisons through parallelism: consistency helps comparisons stand out.
Use vertical lists to test for parallelism: again, to help the reader – but 3-7 items.
Look for parallelism in headings: good for style and presentation.
Save words with parallelisms: at sentence, paragraph and whole-text level.

Economy *
Make verbs do more work: they are the most important.
Use more Verbs: be active, give life to sentences.
Avoid the …ion of and the …ment of: this gives a shorter, livelier sentence.
Make verbs strong: strong verbs do more work than weak ones.
Prefer the present tense: what is future when you write is actual for the reader.
Reduce length of clauses and phrases: minor ideas require minimum words.
Avoid bureaucratese and legalese: use language the reader can understand.
Remove *it is* and *there is*: unless you have no choice.
Use neither too many nor too few prepositions: enough to clarify relationships.

Note: Special rule in special case: e.g., if…., then…

* *Further explanation of these guidelines is included in Part 3: Basic Language Guide to Drafting Legal Documents in English on page 41.*

Section D: Using Defined Terms

Introduction
Your goal in drafting a transactional document is to make is speak unambiguously and accurately. Future readers should know exactly what your document means—regardless of whether those future readers are your client, you client's successors, some other party, or a judge. A good technique for achieving this goal is the use of defined terms.

When should you use defined terms?

A. As soon as you know you will refer to the same concept more than once in a document; and

B. When it takes more than a few words to explain the concept

How do defined terms work?

A. "External" defined terms are unique to the external circumstances of this particular transaction (names of parties, location of real property, etc.). They tie the document to the outside world and the larger transaction. External defined terms are especially useful when facts are subject to future development and the exact details of the transaction are not yet known. They should all be defined early in the document.

B. "Internal" definitions, by contrast, refer solely to concepts internal to the particular document. They might refer to external defined terms.

How can defined terms simplify transactional documents?

A. They can assure that any particular laundry list will appear only once in a document. This preserves simplicity, certainty, and consistency.

B. If properly structured, defined terms can allow you to make a necessary change only once—by fine-tuning or modifying a defined term—as the terms of the transaction are negotiated and modified over time.

C. Defined terms can help you prevent a maze of cross-references.

How should you create defined terms?

A. Take a "structured" approach, setting up definitions as "building blocks" that work together.

B. As much as you try to broaden or clarify a defined term, it should still mean what it intuitively seems to mean without close scrutiny of the definition.

C. Beware of setting up a "broad" defined term and then using it in a context where you need a "narrow" defined term.

D. Avoid using words like "applicable" or "actual" or "selected" or "operative". They don't help the user remember what the term is about.

E. When defining related concepts, the defined terms should interact in a way that reflects the interaction of the underlying concepts

F. Collect your definitions in one place.

Final advice:

Don't get carried away. Some concepts are simple enough, basic enough, and sufficiently well understood (or vagueness may work in your favor) that you don't need a definition.

Chapter 2: Contract Principles

Section A: Basic Attributes of the Contractual Relationship

Introduction

A contract may be defined as an *exchange relationship* created by oral or written *agreement* before *two or more persons*, containing at least one *promise* and recognized in law as *enforceable*. The essential elements of a contract thus include: an oral or written agreement; the involvement of two or more persons; an exchange relationship; at least one promise; and enforceability.

An oral or written agreement

Probably the most important attribute of contract is that it is a *voluntary, consensual* relationship. A contract is created only because the parties, acting with free will and intending to be bound, reach agreement on the essential terms of their relationship. It is the element of agreement that distinguishes contractual obligations from many other kinds of legal duty that arise by operation of law from some act or event, without the need for assent.

Determining whether the parties actually agreed to a contract is not always easy. The law generally gauges intent objectively in deciding whether a person agreed to a contract. That is, the person's overt acts (i.e., words and conduct) are evaluated to decide whether they reasonably signified intent to enter the transaction.

Although oral contracts may be enforceable under some situations, in other situations certain types of contracts must be recorded in writing and signed in order to be enforceable. The legal doctrine known as the *statute of frauds* specifies the types of contracts that must be written in order to be enforceable. The statute of frauds developed in English common law, but similar rules have been codified in other jurisdictions, including the United States. Statutes requiring written contracts generally include situations involving contracts for the sale of land, contracts that cannot be performed within a year, and contracts for the sale of goods.

Involvement of Two or More Persons

While it requires two parties to create a contract, it should be noted that a contract is not confined to two participants. There can be as many parties to a contract as the needs of the transaction dictate. In fact, multiparty contracts are common.

An Exchange Relationship

By entering into an agreement, parties bind themselves to each other for the common purpose of the contract. Thus, the essence of a contract is the relationship. Some contractual relationships last only a short time and require only a minimal interaction. Other contractual relationships, however, can span many years and

require constant dealings between the parties, regulated by detailed provisions in the agreement.

The essential purpose of the contract relationship is *exchange.* Simply stated, the very essence of contract is a reciprocal relationship in which each party gives up something to get something. Exchange continues to be the principal motivation for contracting and the guiding rationale for the rules of contract law.

Promise

For a contract to exist, there must be promise. A *promise* is an undertaking to act or refrain from acting in a specified way at some future time. This promise may be made in express words or implied (i.e., inferred from conduct or from the circumstances of the transaction). *Bilateral* contracts are formed when promises remain outstanding on both sides at the instant of contracting. *Unilateral* contracts are formed when one party has fully performed but a promise by the other party remains to be performed at the time of contracting. Instantaneous exchanges, even though consensual, do not constitute contracts because they do not involve promises.

Legal Recognition of Enforceability

It is a hallmark of contracting that it creates rules binding on the parties and confers on them rights and obligations cognizable in law. The fundamental role of contract law is to ensure that promises are upheld. Without legal enforceability of promises, only instantaneous exchanges could ultimately occur—with devastating effects on society. Where promises are broken, the power of legal enforcement enables the disappointed party to sue. Once it is established that a contract was entered into and breached, courts can enforce the contract by providing a remedy for the breach. Such remedies can include monetary compensatory damages, specific enforcement of the promise, and other types of damages. Legal enforceability thus serves to deter breaches of contract because a reluctant party knows that failure to perform can result in litigation with costly results.

Section B: Overview of Contract Standard Provisions

Introduction

The components of a contract will vary depending on the nature and complexity of the transaction it reflects. There are, however, some terms that may be considered standard that usually appear in documents in contracts in some form or another.

Title
The title should reflect the subject matter of the transaction and, if appropriate, the parties.

Preamble (Recitals)
Most transaction agreements begin with some form of a preamble that identifies the purpose of the document and describes the transaction, the intent of the parties and any assumed facts underlying the transaction. The preamble identifies the parties and the date of the transaction as well as the nature of the transaction. In many contracts, this appear as the "whereas" section, in which all of the statements begin with that term.

Definitions
The use of defined terms can simplify a document immeasurably. While the number and extent of the definition section depend upon the nature of the agreement, virtually all contracts will include some defined terms.

Consideration
Although it need not be complicated, the consideration should be explicitly stated since agreements must be supported by consideration. This may be expressed as an exchange of dollars or of goods, or perhaps an exchange of mutual promises.

Covenants
The covenants memorialize the promises that are being made by the parties. Examples include promises to deliver certain goods or to refrain from particular activities.

Representations and Warranties
Representations and warranties identify the assumed facts underlying the agreement. These sections represent the real heart of the deal and tend to be heavily negotiated. An example would be a representation and warranty that the goods to be sold are in working order.

Indemnification
The indemnification portion of the contract deals with the allocation of liability in the event that all does not go as planned. Questions to be addressed in this portion of the contract include who will be liable for what, and to what extent.

Breach and Cure
Although promises are not necessarily made to be broken, that possibility must be considered when drafting a contract. What will constitute a breach of the agreement? What opportunity will the parties have to "cure" the breach?

Termination
This section should identify under what circumstances the parties can terminate the agreement and the procedures for termination.

Remedies
The remedies section addresses the consequences in the event of termination. This section should specify what the parties are entitled to in the event of breach or termination. It may identify a dollar amount, a formula, or simply a mechanism for determining the appropriate remedy (such as arbitration).

Additional Important Contract Provisions
A number of other standard provisions are important to include in drafting contracts. These include:

- *Assignment*
- *Choice of Law*
- *Amendment and Waiver*
- *Arbitration*
- *Integration and Severability*
- *Notice*
- *Authority to Sign*

Section C: Promises and Conditions

Introduction
By definition, all contracts—whether express or implied in fact—consist of at least one promise. The parties to a bilateral contract, by definition, have also exchanged promises of future performance. Because future performance is at issue, contracts may also include conditions to performance of an obligation. The obligations contained in a contract may be promises or conditions, the breach of which typically has different consequences.

Promises
A promise may be defined as the manifestation of intention to act or refrain from acting in a specified way, so made as to justify the one to whom the promise is addressed in understanding that a commitment has been made. Typically, the parties to a contract make multiple promises. From a drafting standpoint, parties sometimes use language other than the word "promise" in expressing their commitments to future performance. Language to establish a promise includes the use of "shall", "will", "must", "is obligated to", "covenants" or "agrees to" (but see above (p. 18). Failure to perform the obligation created by an enforceable promise constitutes a breach of contract, which breach entitles the promisee to a remedy from

the promisor. Remedies for breach of promise can include compensatory money damages or a discharge of the promisee's own duties of performance (if any) under the contract.

Conditions

Conditions refer to events, the occurrence of which either triggers or discharges the duty of a party to a contract to perform the obligations created by the promises. It is important to understand that such conditions refer to conditions to performance of an obligation of a contract that has already been formed. An event that conditions performance may be either a "condition precedent" or a "condition subsequent". A condition precedent is an event that must occur before performance of an obligation becomes due. Thus, the occurrence of the condition precedent triggers the obligation in the contract. In contract, a condition subsequent is an event whose occurrence discharges an obligation. The use of conditions precedent is more common in contract drafting. Typical language for the expression of conditions are phrases such as: "if…, then…"; "provided that…"; "on condition that…"; "in the event that…". In addition to express conditions written into the contract, some conditions may be implied from circumstances (such as usage of trade). The consequence for non-occurrence of an event that is made a condition of an obligation in a contract can be significant: the conditioned obligation of a party typically would become discharged.

Section D: Warranties

Introduction

Most agreements will include affirmative duties owed to each party by the other party, in specific sections setting forth each party's respective performance obligations. In addition, contracts generally include warranties, indemnities, and limitations on warranties.

Warranties

Simply stated, a warranty is a promise. Warranties are, for the most part, promises concerning the future quality or performance of goods to be sold or leased, of real property to be sold or leased, of intellectual property to be sold or licensed, or of services to be rendered. A breach of warranty results if the quality or performance falls short of the promise made in the contract. In addition, commercial codes describe the express and implied warranties that arise in certain transactions. Some warranties are statements of facts. A breach of warranty would result if the fact warranted is untrue. However, whether the warranty is based on promise or statement of fact, breach of warranty has the same consequences as the breach of any other promise.

Representations
Representations are statements of facts. Many types of contracts contain "representation and warranties" sections that set forth statements and promises upon which the respective parties rely in entering into the agreement. When thus included in a contract, some statements of fact may be considered warranties, with the inaccuracy of the statement having the same consequence as a breach of promise. Other statements of facts, if untrue, may entitle the other party to seek to void the contract on grounds of misrepresentation or to seek damages for deceit, rather than to seek damages for breach of promises.

Indemnities
An indemnity is a promise by one party to take financial responsibility for damages that the other party may suffer as a result of the first party's breach of its warranties under the agreement. Where contracts include representations and warranties, an indemnification clause should also be included. Pursuant to such indemnities, each party would agree to pay any damages and costs of litigation involved from a breach of its warranties. Since both parties should be willing to bear the cost for problems resulting from breach of their warranties (especially damages to third parties resulting from a breach of a party's warranties), an indemnity clause serves as a mechanism for allocating the risk of loss from certain problems.

Limitations on Warranties
In addition to making promises (or no promises, in cases where a party disclaims all warranties) and stating who will pay for certain costs that may arise, many contracts address the amount and kind of damages that a party will pay. A party can seek to limit its liability by disclaiming all warranties other than those expressly specified in the contract. A party can also limit its liability by including clauses that provide: a monetary cap on damages; exclusion of certain kinds of damages (such as special, incidental, or consequential); exclusion of certain harms (such as harms resulting from defects, for example). The legality of such limitations of liability may vary among jurisdictions. Some jurisdictions require that any such disclaimers be prominently displayed (such as in bold type or all capital letters).

Chapter 3: Establishing Agreement, Rights and Obligations, Remedies

Section A: Establishing an Agreement: Offer, Acceptance and Consideration

Introduction
Five essential elements of a valid contract include: competent parties; subject matter; legal consideration; mutuality of agreement; and mutuality of obligation.

Competent Parties
Competency of parties includes being of adult age (18 years of age in some jurisdictions) and being in complete control of mental faculties. This means that the contracting party must not have a mental defect that would affect his/her ability to understand and appreciate what he/she is doing.

Subject Matter
The contract must clearly and sufficiently set out the subject matter of the agreement. The subject matter may not be illegal or for an illegal purpose.

Legal Consideration
Simply stated, consideration is the inducement to a contract. It is the cause, motive, price or impelling influence, which influences a contracting party to enter into a contract. Legal consideration is consideration recognized or permitted by the law as valid and lawful. It is also referred to as good or sufficient consideration. The most common form of consideration is money. However, goods or services or a combination thereof may also constitute valid consideration.

Mutuality of Agreement
For a contract to be valid and enforceable, the parties must be in agreement as to their respective rights and duties under the agreement. Mutuality of agreement is also referred to as a "meeting of the minds."

Mutuality of Obligation
The doctrine of mutuality of obligation provides that neither party to a contract is bound unless both parties to the contract are bound. Thus, if performance of an obligation (which is the consideration of the particular contract) is elective, rather than mandatory, and the other party is required to perform some duty, then there would be no mutuality of obligation and, accordingly, no valid enforceable contract.

Section B: Remedies

Introduction

A breach of contract terms occurs when a party fails to perform either fully or adequately the obligations provided in the contract. In the event of breach, the non-breaching and performing party may be provided relief for the breaching party's failure to perform its obligations.

Damages

Damages are generally designed to compensate the non-breaching party for the benefit of its bargain. Damages may be compensatory, consequential, punitive or nominal. The non-breaching party generally has an obligation to mitigate its damages. Types of damages include:

- *Direct damages:* Losses incurred by the victim of a breach in acquiring the equivalent of the performance promised under the contract, so as to substitute for the performance that should have been rendered by the breaching party.
- *Consequential damages:* Losses suffered by the victim of a breach going beyond the mere loss in value of the promised performance (direct damages), and resulting from the impact of the breach on other transactions or endeavors dependent on the contract.
- *Punitive damages:* Damages awarded, not to compensate the victim for established loss, but to punish the breaching party and make an example of him.

Liquidated Damages

At the time of contracting, the parties may wish to avoid disputes and uncertainty over damages if a breach should occur in the future. They may include a term in the contract itself that seeks to fix in advance the amount of damages to be paid if a breach occurs. Such "agreed damages" provisions are referred to as *liquidated damages* clauses. Liquidated damages clauses can be enforceable if the clause was fairly bargained, was a genuine attempt to forecast probable loss, and is not disproportionate to the actual loss ultimately suffered. If the clause fails to meet these standards, it is generally treated as a penalty and is unenforceable.

Specific Performance

The non-breaching party may seek a court order to force the breaching party to perform in accordance with contract terms. This remedy is generally granted in situations where money damages are inadequate as a remedy.

Rescission and Restitution

Another remedy involves cancelling the contract and making restitution to the parties. Rescission is the cancellation of a contract. In its most common use, rescission is the victim's termination of the contractual relationship following a material and total breach by the other party. Rescission ends the victim's

performance obligations under the contract. Restitution is a judicial remedy under which the court grants judgment for the restoration of property or its value to the damaged party.

Reformation

Reformation is an equitable remedy that allows the parties to rewrite or reform the contract as originally created in order to reflect what they intended.

Limitations and Waivers

The non-breaching party may waive its right to enforce a remedy. Generally, contracts provide that waiver of one event of default does not mean waiver of any future defaults. If permitted by law, the contracting parties can limit the type and amount of remedies provided to the non-breaching party.

Voidable Contracts

A contract that is void is not legally enforceable and the parties thereto are not legally obligated to each other. Generally, contracts are void because the subject matter is not legal or one of the contracting parties does not have the competency to contract. For example, a contract to commit a crime is void and cannot be enforced.

A contract that is voidable is otherwise a valid contract but the obligations can be avoided for certain reasons permitted by law (such as duress or lack of capacity). The party with the capacity to void the contract can choose to ratify the contract and perform the obligations thereunder.

An unenforceable contract is generally a valid contract but is not enforced because of public policy.

Chapter 4: Planning Ahead for Problems; Interpreting Contracts

Section A: Termination Provisions

Introduction
When negotiating a contract, special attention should be given to "exit provisions". Well-drafted termination provisions are among the most valuable contractual protections.

Termination for Cause provisions
Termination "for cause" refers to a material breach that is not cured within a specified period.

Opportunity to Cure provisions
Termination sections often grant the damaged party the right to terminate the agreement in the event of a material breach of the agreement by the other party. With respect to curable breaches, such provisions typically provide that the damaged party shall have the right to terminate the contract if the breach is not cured within a specified time period.

Events Triggering Termination
Contracts also often grant the parties the right to terminate upon the occurrence of certain specified events. These can include (but are not limited to):

- *Insolvency, bankruptcy or liquidation*
- *Merger of the other party*
- *Change of control of the other party*
- *Changes in governmental regulations*
- *Failure to meet certain specified performance levels*

Section B: Impracticality of Performance and Frustration of Purpose

Introduction
Mistake concerns an error of fact in existence at the time of contracting, so fundamental to the premise of the contract that it precludes the formation of true assent. Impracticability applies when events following contract formation are so different from the assumptions on which the contract was based, that it would be unfair to hold the adversely affected party to its commitments. There is an important difference between mistake and impracticability. A mistake causes a defect in contract formation, permitting a party to be excused from accountability for a manifestation of assent. Impracticability, on the other hand, has nothing to do with any problem in formation and presupposes that a binding contract was made. Rather,

it is concerned with whether a post-formation change of circumstances has such a serious effect on the reasonable expectations of the parties that it should be allowed to excuse performance. Similarly, the doctrine of frustration of purpose is also concerned with a post-formation change of circumstances but in a slightly different context than the doctrine of impracticality of performance.

Elements of the Excuse of Impracticality

The excuse of impracticability can be available to the party who is adversely affected by the change in circumstances. However, all elements to this defense must be satisfied in order for a party to be excused from performance. These elements include:

1. After the contract was made, an event occurred, the non-occurrence of which was a basic assumption of the contract.
2. The effect of the event is to render the party's performance "impracticable", i.e., truly burdensome.
3. The party seeking relief was not at fault in causing the occurrence.
4. The party seeking relief must not have borne the risk of the event occurring.

Understanding the Limitations on the Excuse of Impracticability

Impracticability arises from the occurrence of an event which event must be so contrary to the assumptions of the contract that it changes the very basis of the exchange. An event is unforeseen by the parties if they themselves did not contemplate it as a real likelihood. Most occurrences external to the contract could quality as events, such as: war, a natural disaster, a strike, and so on. A change in the law or government regulation could also be an event. On the other hand, a change in market conditions would not generally be regarded as a contingency beyond the contemplation of the parties. A person should not be able to take advantage of his own wrongful or negligent act, and a party who makes performance more difficult or disables himself from performing, cannot expect to be excused from liability. Risk allocation is often the dispositive issue in impracticability cases. Thus, if the party adversely affected by the event has expressly or impliedly assumed the risk of its occurrence, then the non-performance cannot be excused even when all the other elements of an impracticability defense are satisfied. Thus, careful drafting is required with respect to risk allocation in a contract.

Frustration of Purpose

Like impracticability, frustration of purpose is concerned with a post-formation event, the non-occurrence of which was a basic assumption on which the contract was made. This event must not have been caused by the fault of the party whose purpose is frustrated; and that party must not have borne the risk of its occurrence. The doctrine of frustration of purpose differs slightly from the doctrine of impracticability. The essential difference lies in the effect of the event. Frustration

of purpose arises when the impact of the event is on the benefit reasonably expected by a party in exchange for the performance, rather than directly affecting the performance of the adversely affected party by making it unduly burdensome. In this case, the event so seriously affects the value or usefulness of that benefit that it frustrates the contract's central purpose for that party. As to the purpose that has been frustrated, the purpose must be so patent and obvious to either party that it can be reasonably regarded as the shared basis of the contract.

Section C: Risk Allocation in Contracts

Introduction

Risk allocation is often the dispositive issue in mistake and impracticability cases. The analysis of risk allocation is relatively straightforward: if the party adversely affected by the event had expressly or impliedly assumed the risk of its occurrence, the non-performance cannot be excused even if all other elements of a defense or excuse are satisfied. The first place to look in determining risk allocation is the contract itself. If the parties realized that a particular future event could affect performance, the contract may include an express and specific term assigning risk. Even if the parties do not have a particular contingency in mind, the contract may have a more general provision allocating the risk of disruptions or calamities. Such general provisions are called *force majeure* clauses.

Force Majeure Clauses

Force majeure is a term used to describe a "superior force" event. Force majeure clauses have two purposes: they allocate risk and put the parties on notice of events that may suspend or excuse service.

The essential requirement of force majeure is that the invoking party's performance of a contractual obligation must be prevented by a supervening event that is unforeseen and not within the control of either party. Typical force majeure provisions include: "acts of God", superseding governmental authority, civil strife and labor disputes. However, there is no uniform set of events that constitute force majeure. Instead, force majeure remains a flexible concept that permits the parties to formulate an agreement that corresponds to their unique course of dealings and industry idiosyncrasies. Moreover, recent world events have increased the necessity of including additional unthinkable events, such as terrorism and the risk of biological and chemical warfare.

Negotiating Force Majeure Clauses

Parties negotiating a force majeure clause must scrutinize the events and allocation of risk to assure that the clause is not one-sided or unenforceable.

Drafting a Force Majeure Clause
In drafting force majeure clauses, parties may rely on general clauses or specifically enumerate which events will constitute force majeure. A prudent force majeure clause specifically enumerates the events that will prevent performance and entitle a party to suspend or excuse an obligation. Force majeure clauses may also include language that is industry specific.

Invoking a Force Majeure Clause
Generally, a party may invoke a force majeure clause if an enumerated event occurs that is out of the party's control and prevents performance of a contractual obligation. The burden of proof is on the party seeking to invoke the force majeure clause. The force majeure event may either suspend or excuse a party's performance.

Sample Force Majeure Clause
Neither party shall be liable in damages or have the right to terminate this Agreement for any delay or default in performing hereunder if such delay or default is caused by conditions beyond its control including, but not limited to Acts of God, Government restrictions, wars, insurrections ad/or any other cause beyond the reasonable control of the party whose performance is affected.

Additional Risk Allocation Clauses
In addition to a *force majeure* clause, a contract may impliedly place risk on a party by means of a provision such as a warranty, an undertaking to obtain insurance, or some other commitment from which the assumption of risk may be inferred. It is good planning for the parties to consider potential risks and to provide for them clearly in the contract. This reduces the possibility of later disputes and litigation.

Section D: Clauses that Address the Possibility of Future Litigation

Introduction
Too often, a situation that might have been quickly and easily resolved by simply referring to well-drafted contract language turns into costly and time-consuming litigation. Whether the contract is simple or complex, clauses that address the possibility of future litigation should never be overlooked.

Forum Selection Clause
Forum selection clauses specify the place where lawsuits will be filed in the event a dispute arises between the parties to a contract. Specifically, the parties utilize such clauses to expressly agree to litigate all disputes arising from the contract in a

specific jurisdiction and venue. Such clauses offer obvious practical value, as selecting the forum in which a contract dispute is to be heard can help keep the litigation in a nearby forum, reduce future costs, and eliminate the need for challenges to jurisdiction in the event suit arises.

Choice of Law Clause

Parties may also negotiate which laws will govern their contract. Specifically, choice of law clauses specify the legal jurisdiction under which the agreement shall be governed and construed. While there are clear advantages to the parties for inserting such clauses into their contract, there must also be a rational reason for the specified choice of law. Such clauses require careful research and negotiation, because the laws of different jurisdictions may affect the parties differently. A choice of law clause may not completely shelter a party from having the laws of other countries imposed upon it (for instance, by claims of third parties), but the clause may at least define the laws that govern the immediate relationship between the contracting parties.

Alternative Dispute Resolution Clause

Many types of agreements contain alternative dispute resolution clauses that obligate the parties to submit their disputes to arbitration or mediation rather than litigation. Alternative dispute resolution procedures are often cost-effective and enable disputing parties to pursue their claims more quickly than traditional litigation. Through the use of alternative dispute resolution clauses, the parties can agree to such specific matters as: whether the arbitration will be binding or non-binding; how the arbitration provision is to be triggered; where the arbitration would take place; which rules will govern the arbitration proceedings; and the selection of the arbitrators. Thus, properly drafted dispute resolution clauses can provide assurance to the parties that their disputes will be resolved through the less expensive and speedier processes of arbitration or mediation rather than by litigation. Moreover, alternative dispute resolution clauses are of particular value in international agreements, in light of the availability of established arbitration institutes to serve as a forum for disputes involving contracting parties from different countries.

Chapter 5: Other Important Clauses; Assembling Contracts

Section A: Understanding General Clauses

Introduction

Contracts typically include a general section containing a number of business matters relating to the agreement. These clauses are usually located at the end of the agreement. Some general matters to be considered for inclusion in contracts are described below.

Integration Clause (Entire Agreement Clause)

It is customary to provide that the agreement constitutes the entire agreement between the parties. The purpose of this clause is to state for the record that there are no representations, warranties, terms or conditions between the parties other than those set out in the agreement. Such clauses are intended to prevent related dealings or agreements between the parties entered into before or after the execution of the agreement, from being used to vary or interpret its provisions.

Waiver Clause

There may be times when the parties want to waive a breach or default of a provision of the agreement. A clause dealing with this circumstance usually provides that a waiver of a breach or default will not constitute a waiver of a succeeding breach or default of the same provision. Another typical waiver clause provides that any delay or omission in exercising any right under the agreement does not constitute a waiver of that right.

Time is of the Essence Clause

A clause can also be inserted to provide that, in relation to certain events, time is of the essence. This means that time periods and limitations must be strictly observed or else the contract is terminated.

Amendments Clause

Sometimes the parties want to change the agreement. A typical amendments clause providing for this possibility would state that the agreement may be amended only in writing and must be agreed to by an authorized representative of both parties.

Independent Parties Clause

This clause typically provides that the agreement will not create a legal relationship between the contracting parties (such as a partnership, joint venture, franchise or any other form of business organization or relationship). Neither party has the authority to create obligations on behalf of the other party except as provided in the agreement.

Survival Clause
It is customary to specifically provide for the survival of an obligation after the termination of the contract. For example, if the parties intend for warranties to survive the termination of the agreement, then they would specifically so state in a survival clause.

Severability Clause
If the contract is ever litigated, it is possible that a court could rule that only a part of the agreement is invalid, illegal or unenforceable. To provide for this possibility, an agreement can provide that the invalid, illegal, or unenforceable part can be severed from the agreement and that the remainder of the agreement can continue in full force and effect.

Remedies Clause
An agreement often provides a statement of remedies that are available in case of a breach. However, there are also general remedies available under the law. This legal situation is often addressed by including a provision that states that the remedies expressly stated in the contract shall be in addition to, and not in substitution for, those generally available under the law.

Further Assurances Clause
Including this clause obligates parties to perform further actions or execute further documents after closing or execution, either indefinitely or for a specified period of time.

Currency Clause
When negotiating international agreements, it is wise to insert a clause specifying the currency in which money owing under the agreement is to be paid. This can also come into play in the event a court awards damages under the agreement. Consideration should also be given to specifying a conversion date in this clause.

Section B: Assignments

Introduction
It is not uncommon for a party to wish to assign certain rights to payment or performance to a third party. Through the use of an assignment clause in a contract, the benefit of the contract can be reassigned from the intended beneficiary to a third party.

Effecting an Assignment
An assignment involves the act of transferring to another all or part of one's property, interest or rights. To assign a right, the assigner must show intention to make the present transfer without any further action required (by either party). From a drafting standpoint, it is best to use an active verb to connote immediate movement of the right from assignor to assignee. Examples include "I hereby give, transfer, convey". Avoid using such terms as "will" or "promise to", because such language suggests that the assignment hinges on a future event. Although oral assignments may be binding in some cases, it is generally in the parties' interests to make the assignment in writing and executed by both the assignor and assignee. Any written assignment should clearly identify the parties and rights being transferred. A written assignment should also define the consideration given by the assignee (if any) in return for the benefit of the assignment.

Limitations on Assignments
The ability of a party to assign its interest in a contract may be limited by contract, or in some cases by law or public policy. Parties can protect themselves from assignments by adding a clause to the contract to either: (a) prohibit assignment of any contract right, or (b) prohibit any such assignments by one party without the consent of the other party to the contract.

Section C: Contract Interpretation Issues

Introduction
When the terms of an agreement are expressed clearly and comprehensively, the fact of contract formation and the extent of each party's commitment can be ascertained with relative ease by the interpretation of the language in the written contract. However, problems arise in cases where the parties fail to express their assent adequately, leave a material aspect of their agreement vague or ambiguous, or fail to resolve or provide for a material aspect at all. Obviously, such problems can arise when insufficient attention to detail is given in drafting the contract; similarly, poor drafting can result in the contract not clearly reflecting the parties' expectations. Indefiniteness can thus result from vagueness, ambiguity, omission or irresolution.

Problems of Vagueness and Ambiguity
Vagueness results when a term is stated so obscurely or in such general language that one cannot reasonably determine what it means. Ambiguity results when a term is capable of more than one meaning. Ambiguity can lie in a word itself or in the structure of a sentence; ambiguity can also result from inept sentence construction. Sometimes, the parties' meaning can become clear if interpreted in context. Some clarity may be gained by reference to the parties' course of dealing, custom or usage in the commercial environment in which the parties made the agreement, or by

standardized terms recognized by law. But contextual evidence cannot always save a vague or ambiguous term. Thus, failure to properly communicate the parties' intentions in the agreement can result in the contract not being sufficient to create an enforceable relationship.

Omitted Terms

If a term is omitted, it simply is not there. The agreement would have a gap regarding that particular aspect of the parties' relationship.

Unresolved Terms

Unresolved terms result when the parties have raised an issue in their agreement, but have not yet settled it, leaving it to be resolved by agreement at some later time. In such cases, indefiniteness results from the parties' deliberate postponement of agreement on the particular term. Nevertheless, an "agreement to agree" is not regarded as definite enough to create a firm and final contract.

"Gap Fillers"

A "gap filler" is a provision legally implied into a contract to supplement or clarify its express language. In attempting to interpret indefinite contracts, gap fillers may be used to supplement contracts (but not to override the parties' probable intent). Gap fillers are standard terms supplied by law. Some gap fillers supply generalized obligations that are likely to be implied in all kinds of contracts; some gap fillers are very specific and relate to particular types of terms in specialized contracts. An example of a gap filler that supplies a general obligation is the obligation implied by the law that the parties use their best efforts to effect the contract's purpose. Commercial codes (such as the CISG or the UCC) supply gap fillers that relate to specific aspects of particular kinds of contracts.

Implication of Law Irrespective of Intent of the Parties

Nevertheless, some legally implied obligations are so fundamental to fair dealing or so strongly demanded by public policy that they are mandatory and are part of the contract regardless of the parties' actual intent. Such terms are more a matter of regulation than of intent. That is, the law's true purpose in imposing standard terms is not so much to ascertain what the parties reasonably must have intended, but to limit contractual autonomy in the interests of public policy. For example, the underlying policy may be to protect a weaker party from one-sided and unfair contract terms. One of the most important and pervasive mandatory construed terms is the general obligation of both parties to perform the contract reasonably and in good faith. It should also be noted that there are some construed terms that are so strongly implied as a matter of public policy that they become part of the contract unless the express terms of the agreement clearly exclude them. In some cases, even a clear exclusion is not sufficient unless it complies with specified rules that may

prescribe the use of particular language or format. Examples would include disclaimers of warranties.

Terms Left for Future Determination

If the parties cannot agree upon a specific term and determine to leave it for future determination, they have a number of alternatives. First, the parties can decide on a formula or an external source or standard in order to provide for objective criteria for future determination of the term. As a second alternative, the parties can opt to leave the determination of the term to the discretion of one party, although such a provision is risky to the party who defers discretion to the other. The parties can also opt to omit the term from the contract; however, the omission of a central term may render the contract itself unenforceable. The parties may also deliberately defer the term by "agreeing to agree"; however, caution is necessary in such cases since the general rule is that no contract comes into existence until all its material terms have been settled.

PART 3

Basic Language Guide to Drafting Legal Documents in English

Archaic terms ***e.g.:***

hereinafter

hereby

aforesaid

deem

Avoid these where possible!

Legal pairs and phrases, e.g.:

at or about

any and all

basic and fundamental

full and complete

true and accurate

each and every

true facts

important essentials

initial preparation(s)

future plans

period of time

accurate manner

at an early time

educational process

good and sufficient

Either replace with a single word, or choose one of the words.

Latin or foreign expressions e.g.:

bona fide
ipso facto
pacta sunt servanda
in rem

Plain English, not legalese

Not… *but…*

perform	do
render	make/give/give back
commence	begin/start
terminate	end/stop
ascertain	learn/find out
deem	think/consider
on the grounds that	because
for the reason that	because
due to the fact that	because
based on the fact that	because
in view of the fact that	because
owing to the fact that	because
during the course of	during
in the event that	if
for the purpose of	to
the question as to whether	whether
take into consideration	consider
a number of	some/many
annex	attach
approximately	about
at the present time	now
commence	begin
despite the fact that	although
dispatch	send
forward	send
mutually agree	agree
per annum	a year
portion	part
pursuant to	by, under
remainder	rest
retain	keep
subsequent to	after

(see also below: “Officialeglish”)

Passive to active: examples

> When the employee *is returned* to duty, leave balances *are reconstructed* and any leave *forfeited is restored.*

becomes:

> When the company returns the employee to duty it reconstructs leave balances and restores any forfeited leave.

and…

> Written comments *should be sent* to Mindaugas Ensefalaitis. *They must be received* on or before May 1.

becomes:

> Please send written comments to Mindaugas Ensefalaitis, to reach him on or before May 1.

and finally…

> In response to comments *that were received*, it *has been determined* by the department that proposal § 151.12 *will be deleted* and a new *part will be added.*

becomes:

> In response to comments, the department will delete proposed § 151.12 and add a new part.

Sentences: keep them short

One 50-word sentence…

> It has been determined that this is not a major amendment under EU Directive 12291 because this amendment will not result in an annual effect on the economy of €100 million or more or a significant increase in costs for consumers; industry; or Community, Member State, or local government agencies.

… could read as three short sentences:

> This is not a major amendment under EU Directive 12291. It will not result in an annual effect on the economy of €100 million or more. Nor will it significantly

increase costs for consumers; industry; or Community, Member State, or local government agencies.

Sentences: keep subjects and verbs together:

The following:

> ***The courts generally***, when a taxpayer hands over all books and records and otherwise makes a full and complete disclosure of all of the facts to a third party to whom the task has been given of preparing the taxpayer's annual tax return, ***will not find fraudulent intent***.

looks better as…

> ***The courts generally will not find fraudulent intent*** when a taxpayer hands over all books and records and otherwise makes a full and complete disclosure of all of the facts to a third party to whom the task has been given of preparing the taxpayer's annual tax return.

Note: the above sentence also has other problems.

Sentences: keep compound verbs together.

> The Director *may*, in accordance with the procedures set forth in part 104 of this chapter, *take* action against counsel for improper conduct in the course of an investigation.

This might read:

> The Director *may take* action against counsel for improper conduct in the course of an investigation. Procedures are in part 104 of this chapter.

Note: the new version also deals with other problems in the first sentence.

Sentences: put verbs early

Verb late:

> Photographs and other kinds of job and professional information such as current duties, prior employment, types of degrees, and schools *are* optional kinds of information for the intranet.

Verb early:

> Optional kinds of information for the intranet *are* photographs and other kinds of job and professional information such as current duties, prior employment, types of degrees, and schools.

Note: the improved sentence could still be better…

Sentences; put main clauses early

Main clause late:

> If it is found that any Member State adjustment to the Commission rule is in any way ambiguous with respect to the stringency of applicability, the stringency of the level of control, the stringency of the compliance and enforcement measures, or the stringency of the compliance dates, for any affected source or emission point, *we will disapprove the Member State rule*.

Main clause early:

> *We will disapprove the Member State rule* if it is found that any Member State adjustment to the Commission rule is in any way ambiguous with respect to the stringency of applicability, the stringency of the level of control, the stringency of the compliance and enforcement measures, or the stringency of the compliance dates, for any affected source or emission point.

Note: the improved sentence could still be *much* better…

Sentences: rearrange long ones

Long and lifeless…

> No person may directly or indirectly offer for three years after the conversion to acquire or acquire the beneficial ownership of more than 10% of any stock in the converted savings association without the prior written approval of the Financial and Investment Controls Agency (FICA).

Surgically punctuated:

> For three years after the conversion, a person must have the prior written approval of the Financial and Investment Controls Agency (FICA) for the following: a direct or indirect offer to acquire (or acquire the beneficial ownership of) more than 10% of any stock in the converted savings association.

Note: the change to positive language helps.

Note also: the possibility to use a list.

Parallelism: grammatical

All parts of a list should use the same grammatical form.
Below are four possibilities:

All actions

In phase 1, do three tasks:

- Conduct paint tests.
- Analyze test equipment.
- Write software documentation.

All things

Phase 1 has three tasks:

- Paint tests.
- Test-equipment analysis.
- Software documentation.

All gerunds

Phase 1 has three tasks:

- Conducting paint tests.
- Analyzing test equipment.
- Writing software documentation.

All infinitives

Phase 1 has three tasks:

- To conduct paint tests.
- To analyze test equipment.
- To write software documentation.

Parallelism: to clarify comparisons

Comparison difficult

The total value of the cash is called "cash in" when deposited into the system. The term "cash out" refers to the total value of the cash removed from the system.

Comparison easy

"Cash in" means the total value of the cash deposited into the system.
"Cash out" means the total value of the cash removed from the system.

Single if *obscures differences*

If the volume of traffic is heavy, vehicles may have to wait at the border for three days or more. Expect a wait of up to two days if the volume of cross-border traffic is light.

Two ifs *clarify differences*

> If the volume of traffic is heavy, vehicles may have to wait at the border for three days or more.
> If the volume is slow, the wait is likely to be less than two days.

Note: Special rule in special case: e.g., *if..., then…*

Use vertical lists to test for parallelism

Running text hides the error

> The identification code speeds up filing, retrieval, and eventually to dispose of the documents.

Lack of –ing *ending stands out*

> The identification code speeds up:
> - filing,
> - retrieval, and eventually
> - to dispose of the documents

Note: a list usually contains no more than seven elements…

Long list loses parallelism

As the Equal Opportunities Counselor, you have these duties:
1. Make whatever inquiries…
2. Seek to resolve…
   *   *   *
9. The aggrieved person's identity must not be revealed.

Long list holds parallelism

As the Equal Opportunities Counselor, you have these duties:
3. Make whatever inquiries…
4. Seek to resolve…
   *   *   *
10. Do not reveal the aggrieved person's identity.

Parallelism for style and presentation in headings

Equal weight to unequal topics
§ 1.1 How to apply to the Court.
§ 1.2 Who may apply to the Court.
§ 1.3 What an application to the Court involves.
§ 1.4 What follows filing of an application with the Court.
§ 1.5 What a final judgment of the court involves.

Minor topics are subordinated
§ 1.1 How to apply to the Court.
[Includes § 1.2 above]
§ 1.2 What an application to the Court involves.
[Includes § 1.4 above]
§ 1.3 What a final judgment of the court involves.

Inconsistency obscures logic
§ 1.1 How the Commission is involved in the approval process.
§ 1.2 What role the Department plays in the approval process.
§ 1.3 Other players.

Parallelism makes logic visible
§ 1.1 How the Commission is involved in the approval process.
§ 1.2 How the Department is involved in the approval process.
§ 1.3 How others are involved in the approval process.

Differences late
§ 1.1 General requirements for all containers.
§ 1.2 Specific requirements for dry bulk containers.
§ 1.3 Specific requirements for liquid bulk containers.

Differences early
§ 1.1 All containers: general requirements.
§ 1.2 Dry bulk containers: specific requirements.
§ 1.3 Liquid bulk containers: specific requirements.

Parallelisms: save words

Wordy

The use of seniority for furlough and rehiring of employees helps employees, and advantages are also gained by employers and communities.

Economical

The use of seniority to furlough and rehire employees helps employees, employers, and communities.

Economy

- Shorter is usually (but not always) better.
- Ten pages may be too much; 100 pages may be not enough.
- Length depends on **content** and **audience**.
- Plain language saves words (but adds headings).
- Plain language improves organization, wording and content.

Useful pointers include:

Economy: make verbs do more work

Verbs are action words. Verbs* do *things.

Economy: use more Verbs

Nouns are static
At the *start* of the program…
Due to *changes* in formats…
The test must include two things:

- A *demonstration* of…
- An analysis of…

Verbs add life

When the program *starts*…
Because formats *changed*…
The test must include two things:

- *Demonstrate*…
- *Analyze*…

Economy: avoid the *…ion of* and the *…ment* of

The …ion of and *the …of*
You are responsible for* the development *and* implementation of *the program.

Trading must stop during *the preparation* by the Exchange for *the replacement of* the electronic price indicators.

Verbs add life

You are responsible for *developing* and *implementing* the program.
Or,
Develop and *implement* the program.

Trading must stop while the Exchange *prepares* to *replace* the electronic price indicators.

Economy: make verbs strong

Examples of weak verbs: *is/are, give, have, make, take, provide*.

Weak verb	Weak sentence	Strong sentence
be	These regulations *are applicable* to all employees.	These regulations *apply* to all employees
have	The regulation will *have a significant effect on* deposits.	The regulation will *significantly affect* deposits.
make	*Make use of* the procedure.	*Use* the procedure.
provide	*Provide motivation* for industry to comply.	*Motivate* industry to comply

Economy: prefer the present tense

Write as if the text (e.g., contract, statute, rule) is already in effect.
That way, you avoid the extra words that go with complex tenses.

Complex verb tenses

§ 1.4 If Employee shall repeat conduct in respect of which Employer has already issued a warning, then the next phase of the disciplinary procedure will come into effect.

Simple present tense

§ 1.4 If Employee repeats conduct covered by Employer's previous warning, then the next phase of the disciplinary procedure comes into effect.

Economy: reduce length of clauses and phrases

Clause

The domestic legal systems <u>*that are subordinate to EU law*</u> retain a degree of independence.

<u>***Phrase***</u>

The domestic legal systems <u>*subordinate to EU law*</u> retain a degree of independence.

<u>***Word***</u>

The <u>*EU*</u>'s domestic legal systems retain a degree of independence.

Economy: avoid "Officialegish" – use plain English

Officialegish phrases	Plain English phrases
comply with	meet, obey
for a period of	for
in accordance with	under
in the amount of	for
in the event that	if
is authorized to	may
on a weekly basis	weekly
prior to	before
provided that	if
pursuant to	under
the provisions of	(avoid)
the requirements of	(avoid)

Officialegish words	*Plain English words*
accorded	given
approximately	about
attempt	try
consequence	result
deem	consider
expend	spend
expiration	end
inform	tell
notify	tell
obtain	get
provided	but, if, unless
regarding	about
retain	keep
said	the, that, those
such	the, that, those
utilize	use

Economy: remove *it is* and *there i*s

Why? Because they make sentences start slowly.

Slow start

It is the legal obligation of the agency to assess a late fee.

There are several proposals that would improve current procedures.

Quick start

The agency is legally obligated to assess a late fee.

Several proposals would improve current procedures.

Economy: use neither too many nor too few prepositions

Too many prepositions

One *of* the requirements is…

The last paragraph *in* the first section *of* the order permits quarterly payment *of* royalties.

About right

One requirement is…

The last paragraph *in* the order's first section allows quarterly royalty payments.

Too few prepositions

oil transportation rate variances

first year additional error correction costs

new interest calculation methods

About right

variances *in* rates *for* transporting oil

costs *of* correcting additional errors *in* the first year

methods *to* calculate new interest?
new methods *to* calculate interest?

PART 4: ASSIGNMENTS

Section A: Introduction and Self-Assessment

Question: What is the difference between the Godfather and a lawyer?
Answer: The Godfather makes you an offer you can't __________.
The lawyer makes you an offer you can't ______________.

For example:
If a normal person gives you an orange, they say:
"Hey, have an orange".
But when a lawyer performs the transaction, they say:
" I hereby give and transfer to you absolutely all my interest, rights, title, claim and advantages to of and in said orange, together with all its skin, juice, pulp and pips and all rights and advantages with full power to bite, cut and otherwise treat the same as you may in your absolute discretion determine or transfer ownership or possession of all or any part thereof namely with or without said skin, juice, pulp and pips as aforesaid."

SELF-ASSESSMENT EXERCISE

What are the Characteristics of a Good Contract?

Quickly read through the following and check off items you think are important.
Use a 1-5 scale, where 1 = not important and 5 = very important indeed.
Would you add any other characteristics?

_____ Clear
_____ Organized
_____ Specific and concrete
_____ Abstract and general
_____ Unclear
_____ Accurate terminology
_____ Correct grammar, punctuation, usage
_____ Long and detailed
_____ Easy to read
_____ A short summary of agreed terms
_____ Legal terminology shows that a lawyer wrote it
_____ Complex
_____ Favours the party whose lawyer prepared it

Section B: Contracts Terminology and Language Development Exercise
Read the following extract from a contract for services between two parties, Alpha and Beta. The agreement is drafted in very formal style. For each space, decide which answer A, B, C or D (on the answer sheet opposite) may be used. **Underline the correct answer on the answer sheet**. ***Total possible score: 10 points.***
There is an example at the beginning (*)

4.2 Secrecy
Not at any time during or after the term to (*) … to any person any confidential information relating to the business or affairs of Beta other than to persons who have signed a secrecy (1) … in a form approved by Beta.

4.3 Delegation
Not to delegate any duties arising under this agreement otherwise than may be (2) … permitted under its terms.

4.4 Intellectual Property
Not to cause or permit anything which may damage or endanger the Intellectual Property of Beta or assist or allow others to do so.

4.5 Indemnity
To indemnify and keep indemnified Beta from and against any and all loss damage or liability (whether civil or criminal) (3) … by Beta resulting from a breach of this agreement by Alpha including
4.5.1 any act or neglect or (4) … of Alpha's employees or agents
4.5.2 breaches in respect of any matter arising from the supply of the Services resulting in any successful claim by any third party

4.6 Insurance
4.6.1 To (5) … at its own cost a comprehensive policy of insurance to cover the liability of Alpha in respect of any act or default for which it may become liable to indemnify Beta under the terms of this agreement
4.6.2 To arrange that the minimum cover of that policy is GBP 1,000,000
4.6.3 To increase such cover by the (6) … of increase in the retail Prices Index in the (7) … 12 months

4.7 Notice
To (8) … with the terms of any notice specifying a breach of the provisions of this agreement and requiring the breach to be (9) … so far as it may be but nothing in this clause is intended to require Beta to serve (10) … of any breach before taking action in respect of it

Can you suggest ways to improve the above text?

ANSWER SHEET: Language Development Exercise

(*) A. give B. tell C. <u>divulge</u> D. inform

(1) A. undertaking B. promise C. contract D. covenant

(2) A. expressly B. particularly C. deliberately D. explicitly

(3) A. undergone B. held C. received D. suffered

(4) A. wrong B. evasion C. default D. emission

(5) A. maintain B. retain C. uphold D. preserve

(6) A. percent B. rate C. amount D. extent

(7) A. prior B. preceding C. following D. subsequent

(8) A. obey B. agree C. accept D. comply

(9) A. remedied B. repaired C. solved D. fixed

(10) A. warning B. communication C. notice D. report

***NOTES:** Can you suggest ways to improve the above text?*

Section C: Redrafting Skills Exercise

Read the three extracts below. The origin of the extract is given. Redraft each extract to make them more easily understood by the client.

Write your answers **on the answer sheet on the opposite page**.
Total possible score: 30 points.

---

1. **From a lawyer's explanation to a client of a statute dealing with tax exemption**

S223(1) provides that a gain accruing on the disposal of a dwelling house will not be chargeable if it has been the individual's only or main residence throughout the period of ownership or throughout such period except fot the last 36 months. This particular provision covers both periods of absence and periods during which the house was used for any other purpose such as letting.

2. From a car insurance policy

Any policy-holder who is insured hereunder and who is deemed to have exacerbated the damage to the vehicle shall have the aggregate amount paid out undet this policy modified accordingly.

3. From the rules of membership of a tennis club

Prior to the attainment of the age of 21 years no member of this club may procure alcohol for his own or any other member's consumption. Any attempt to do so will constitute a breach of club rules and the chairman will initiate the termination of that person's membership as a consequence.

ANSWER SHEET Redrafting Skills Exercise

(1)

(2)

(3)

Section D: Exercise I: Does a Contract Exist?

<u>Under Spitalian law, four elements are needed to create a contract. They are:</u>

1. intention to create a legal relationship
2. offer
3. acceptance
4. consideration

A court will apply an objective test to any dispute to look for these four things. If they all exist then the parties have a contract. If only three exist then the dispute is not the business of Spitalian contract law.

Let us begin by looking at the vocabulary associated with the first element, intention.

This is where the court looks at whether the parties to an agreement really intended to be legally bound by their words. Some important words are:

1. express
2. implied
3. presume
4. amount to
5. appeal
6. enforce

Put one of the words into the sentences below. You can use each word only once. You may have to change the tense of the verb.
<u>Total possible score: 6 points.</u>

A. Where an oral agreement is made between very close friends the court might automatically ________________ that they did not intend to enter into a legal agreement, even if nothing specific was said on the subject.

B. I have given you a letter to show the theatre box office when you collect the tickets. It gives you my _______________ permission to use my credit card to pay for them.

C. The manager of the company decided that if his behaviour ______________ a breach of his contract of employment they may well sack him without notice.

D. I lost the case in the lower court but have been advised that I have grounds for ___________________ .

E. Where two companies have been doing business for a long time, the court might see an ______________________ contract in their behaviour even though they haven't specifically agreed anything.

F. If one party is in breach of contract the other can go to court to try to _____________ the agreement.

Section D: In-Class Exercise II: Do They Have a Contract?

1. Misha and Masha are very good friends. Masha's apartment needs decorating so she calls Misha, who is unemployed at the moment, and asks him: "Will you decorate all three rooms in my apartment for USD 200?" Misha agrees. On May 1 he spends 80 USD on materials and starts work. On 3 May Masha tells him that she needs the work to be finished by 12 May because her parents are coming to stay. Misha agrees to finish the work by then.

   Unfortunately, Misha is a bit lazy and the work is only half done by 14 May. He finally finishes on 20 May and asks Masha for his USD 200, plus USD 80 for the materials. Masha can't believe this. She insists that the USD 200 included the cost of materials, and anyway Misha finished late. She has also lost her job in the last few days and offers him USD 120.

   Misha consults you for advice.

2. Dariusz has been meeting Reelika, a colleague from work, for just two weeks. He is delighted when she agrees to come with him in a month's time for a skiing weekend in Italy, for which he pays USD 1K for both of them. Dariusz buys new clothing for himself for the trip and arranges to have flowers and wine delivered to their chalet as a surprise. He has paid for everything by credit card, which amounted to USD 1500.

   Two days before the holiday, Reelika calls him to say that she is ending their relationship and can't go with him. He insists that she is responsible for at least half of his credit card bill, if not all of it.

   Reelika consults you for advice.

Section E: Contract Structure In-Class Exercise

The Document File to this Compendium contains sample contracts for use in completing course exercises. Please refer to these and analyze them to identify the following structural elements:

1. Title
2. Caption
3. Recitals (preamble)
4. Definitions
5. Closing

Section F: In-Class Exercise: Analyzing Promises and Conditions

Directions: Identify the promises, conditions and promissory conditions in the following contracts. Where you identify a condition, consider whether it is a condition precedent, a condition subsequent, or express condition.

A) A lessor and lessee entered into a lease of real property for a two-year term at a rent of $1,200 per month, payable in advance by the first day of each month. The lease gave the lessee the right to renew the lease for a further two years, provided that she delivered written notice of renewal to the lessor not later than 30 days prior to the end of the second year of the lease. The rent for the renewal period would be $1,500 per month, but if the lessee satisfactorily repainted the premises in the first month of the renewal period, the rent would be $ 1,400 per month.

B) An insurance policy provides that in consideration for an annual premium, payable in advance, the insurer will reimburse the insured for any loss by fire occurring on the insured premises, provided that the insured furnishes satisfactory proof of loss to the insurer within 30 days of the loss.

C) On June 1, the owner of land granted an option to purchase the land. The prospective buyer had until June 30 to exercise the option. On June 10, a second buyer expressed interest in purchasing the land, and the owner entered into a contract with him under which she agreed to sell the land for $100,000 if the grantee of the option failed to exercise it by its expiration on June 30.

D) Following discussions on the possible sale of a car, the owner of the car writes to the prospective buyer, stating "I will sell you my car for $5,000 on condition that you communicate your acceptance to me within five days of the date of this letter."

Section G: Exercise: Drafting Termination Provisions

You have received the following email. Write your reply on the **answer sheet** opposite. ***Total possible score: 10 points.***

To: contractscourse@rgsl.edu.lv
From: confused@needhelp.com
Subject: I need some help
Attachments: Extract from contract for services

Hello
I've got a draft contract for services between us and Beta – we're going to see our lawyer next week, but I really want to understand this part of the contract now. Can you help me? I've attached the part of the contract that I'm interested in – could you send me an email telling me what the clauses mean in plain English and in particular, explaining the words that I've underlined.

Thanks for doing this for me – I owe you one!
Kolya

10. Termination for breach
The following obligations are conditions of this agreement and any breach of them shall be deemed a fundamental breach which shall determine this agreement immediately and the rights and liabilities of the parties shall then be determined in accordance with clause 11:

10.1 failure on the part of Beta to make punctual payment of all sums due to Alpha under the terms of this agreement
10.2 the making by Beta of any arrangement with creditors or being a company Beta's liquidation (other than a voluntary liquidation by the members)
10.3 the doing or permitting of any act by which Alpha's rights in the Intellectual Property may be prejudiced or put in jeopardy

11. Termination consequences
In the event of this agreement being determined whether by effluxion of time Notice breach or otherwise

11.1 Beta shall immediately pay to Alpha:
11.1.1 all arrears of any sums due under the terms of this agreement
11.1.2 all further sums which would but for the determination of this agreement have fallen due at the end of the Term less a discount for any accelerated payment at the rate of 5% per year

- **Can you suggest ways to improve the above text?**

ANSWER SHEET

Reply
To: confused@needhelp.com
From: contractscourse@rgsl.edu.lv
Subject: I need some help

Section H: In-Class Exercise: Agreement to Use On-Line Banking Services

The document you are going to read (see document file) is an agreement between a bank and its business and principal account customers to use an on-line banking service.

First, **check the document to ensure you understand it.**
Next, the following clients need your advice.

1. **Hannelore Beerli has two accounts with the bank, a business account and a principal account. On 1 July she wrote a cheque for GBP 4250 on her business account to pay a repair bill. However, she had only GBP 3500 in the account and had no formal arrangement with the bank to borrow more. She tried to access her other account by computer 5 days later, only to find that she was denied access. She says the bank is in breach of contract because she pays monthly banking charges on her principal account and they therefore had no right to block her access to it.**

2. **Nigel Lang is a night-club owner with a large amount of money in his business account. He authorized his girlfriend, Zeinaba dos Santos, to use his on-line account to transfer cash into her own bank account when she needed it. On 10 July his relationship with Zeinaba ended and he called his local bank that day to tell them that she was no longer authorized to access his account and that he wanted to change his password. However, he was told that she had already transferred GBP 10,000 the day before and that the transaction was complete. The bank refuses to try and recover the money and has told Nigel that his best course of action is to consult a lawyer.**

3. **Rebecca Mehew used the on-line service to transfer GBP 5,000 into her husband's business account to cover a cheque that he had issued that day to buy a second hand car. Unfortunately, there was a technical problem at the bank, so that the transfer was not made. Her husband's bank paid the cheque but told him he will be debited GBP 55 in administrative costs for an unauthorized overdraft. Rebecca thinks her bank should pay the GBP 55 because it was their computers which were at fault.**

4. **Julio Mattias Garcia gave his daughter, Celia, permission to access his business account on line but not his principal account. Julio has just discovered that Celia took GBP 100 from the principal account (current account) hoping her father would not notice it. As Julio wrote to the**

manager of his local bank months ago expressly forbidding the bank to allow his daughter to do this, he wants the bank to refund the GBP 100.

Finally…**Without referring to the contract, translate the following piece of legalese into plain English.**

The bank hereby expressly agrees that the account holder or any authorized user will not be liable hereunder for any unauthorized instruction in so far as such instruction was received after notification had been given to the bank by said account holder or authorized user that the password had become known to some third party or that the actions, negligence or other breach of security attributable to the bank has caused said unauthorized instruction.

Section I: Exercise: Extract From Loan Agreement

The extract below is from a loan agreement between the bank (the Lender) and an individual person (the Borrower).

For each space, fill in the correct formal word, referring to the plain English definitions given below the text.

Total possible score: 21 points.

9. EVENTS OF DEFAULT

Each of the following events and circumstances shall be an Event of Default:

9.1 Failure to Pay: the Borrower (1) … to pay any sum payable under this Agreement when (2) … and otherwise in accordance with the (3) … hereof;

9.2 Performance of Other Obligations: the Borrower fails (4) … and (5) … to perform or (6) … with any of its obligations under this Agreement and, in the case only of a failure which in the opinion of the Lender is capable of (7) … and which is not a failure to pay money, does not (7) … that failure to the Lender's satisfaction within 7 days (or such longer period as the Lender may (8) …) after receipt of written (9) … from the Lender to do so;

9.3 Execution: a (10) … takes possession of all or any part of the business or assets of the Borrower, or any execution or other legal process is (11) … against all or any part of the business or assets of the Borrower and is not (12) … within 14 days,or any order is made against the borrower and is not complied with or (12) … within 14 days (unless the order is subject to appeal and is (13) … by the Borrower in good faith;

9.4 Inability to Pay Debts: the Borrower stops or (14) … payments to its creditors or any class of its creditors, and is unable or under (15) … law is (16)… to be unable or admits its inability to pay its debts as they fall due, or seeks to enter into any composition or other arrangement with its creditors or any class of its creditors, or is declared or becomes (17) …;

9.5 Significant Change: any situation occurs which in the opinion of the Lender gives reasonable (18) … to believe that:

9.5.1 a (19) … and (20) … change in the business or financial condition or prospects of the Borrower has occurred; or

9.5.2 the ability of the Borrower to (21)… its obligations under this Agreement has been or will be (19*) … and (20*) … affected.

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(1) should do but doesn't do
(2) be the proper time for something to happen
(3) requirements
(4) properly
(5) on time
(6) obey
(7) way of putting right, fixing
(8) agree to
(9) official communication
(10) someone who you owe money to

(11) made sure that something is obeyed
(12) released
(13) argued
(14) to stop for a period of time
(15) relevant
(16) considered
(17) unable to pay one's debts
(18) reasons
(19) important, relevant, significant
(20) harmful
(21) carry out

(19* 20*) adverbs of 19 and 20

- Can you suggest ways to improve the above text?

Section J: Exercises: Reading and Understanding Contracts

Before you read, you should be aware of the vocabulary used to refer to the different parts of a contract:

PARAGRAPHS are the major sections of the contract. This contract for example has ten paragraphs.
SUBSECTIONS are the small clauses in each paragraph marked (a), (b), and so on.
PARTS are the further divisions made under a subsction marked (i), (ii), and so on.

Now look up paragraph 3 subsection (b) part (i) in the car hire contract (see DOCUMENT FILE)
If it begins, *that he will not operate…* then you are reading the contract correctly.

Now read the first three paragraphs and complete the exercise below.
Note the mistake where the drafter confused two words and used the wrong one.

A. Match the section underlined in (a)-(i) with one of the meanings 1-9.
Total possible score: 9 points.

(a) …the renter agrees to take on the rental of the vehicle described overleaf subject to all terms and conditions…
(b) The owner warrants that the vehicle is roadworthy.
(c) …in the same condition received, ordinary wear and tear accepted.
(d) …on the due date specified overleaf.
(e) Nor move it, without prior written consent of the owner.
(f) …this agreement is entered into by the driver for and on behalf of the renter.
(g) …or with blood alcohol concentration above the limit prescribed by road traffic legislation.
(h) …and may seize, without legal process or notice to renter…
(i) …vehicle at any time or place and renter waives all claims for damages.

1. decided by a rule
2. warning, time to prepare for something
3. dependent on
4. to voluntarily give up a right
5. to promise that something is true
6. instead of someone, as their representative
7. on the next page
8. excluding the normal amount of damage that can reasonably be expected
9. getting permission in writing before something is done.

B. Quickly – true or false?

(a) I am a taxi driver and my taxi is being repaired. I can use an ABC car as a taxi for the day.
(b) My son is 21. He can use the car if he is correctly insured.
(c) I can hire the car for 14 continuous weeks so long as I pay an extra deposit.
(d) If I breach the contract in any way ABC don't need to go to court in order to take the car away from me.

C. Imagine that you are consulted by the following clients who come to you with the following problems. For each question, decide:
(a) Which parts of the contract provide the answer to the problem.
(b) What advice you would give based on your understanding of the contract.
(c) The language you would use to give a client favourable or unfavourable news.

1. Fujiko Ino parked the car in a London car park and was late in returning to pick it up due to a strike on the underground. She was 20 minutes late and incurred an automatic fine of GBP 100. The letter concerning the fine went to the office of ABC, who are demanding immediate payment. She feels that this is unfair as the fine was not exactly her fault.

2. Francesco Tricomi is a driver employed by a public relations company. The company hired a car for the day to be used for the transport of an important visitor. Francesco crashed the car, causing damage totalling GBP 1825. He was found to be over the legal limit for alcohol consumption. His company have fired him and also insist that he is responsible for paying ABC.

3. Magdalena Leszinska left her hire car in a car park by the river. The parking ticket she bought contained a disclaimer to the effect that the company would not be responsible for loss or damage. Eight hours later she returned to find the car full of water due to flooding. ABC are demanding the full cost of repairing the car, plus a week's rental costs to cover their total loss for the time the car couldn't be hired out due to being under repair.

4. Carlo Blandini rented a car for a few days to go and visit his mother in Baden-Baden. While he was there, he suffered a serious asthma attack. The local doctor gave him medication for 7 days and told him not to drive or operate machinery while he was taking it. He telephoned ABC and asked them to send someone to collect the car, adding that he would be willing to pay the driver's travel expenses. ABC refused because of the distance involved. A dispute as to whether

he was responsible for the extra payment and ABC ended when ABC simply charged the full amount to his credit card. He wants a refund.

5. Elsebet Christensen is a tourist from Denmark who speaks little English. While on holiday in London with her English husband, Elsebet hired a car to drive to Scotland, where she stayed overnight. Elsebet was attacked in a lonely car park by three teenage boys, who stole the car. In a state of shock, she caught a train back to London, where her husband called the police. The call was made some 12 hours after the car had been stolen. She had paid for extra theft protection insurance and had only expected to pay a maximum in case of theft. ABC are demanding the full replacement cost of the car.

6. Vera Ziegler is 18 and a fairly new driver. Another more experienced driver reversed into her hire car while she was manoevring it in a supermarket car park. Although in no way responsible for the accident, she was so nervous that she immediately apologized to the other driver for HER mistake, and a police officer heard her apology. She is now blaming the other driver but ABC are insisting that she has invalidated her CDW insurance.

D. Do you think this contract is satisfactory?

Section K: Sales Representative Agreement Drafting Exercise

Your law firm represents Martins Mebeles Company, an up and coming company that sells and installs office furniture. Until now, Martins has always sold furniture directly to customers solicited through direct mail. Now, however, Martins has decided to try hiring salesmen. Martins would like to hire Kaspars Salesmanis to be its first salesman.

Martins wants you to draft a Sales Representative Agreement between Martins Mebeles Company and Kaspars Salesmanis.

Martins Direktors is the owner of Martins Mebeles Company. He has specified the following list of provisions that he wants included in the Agreement. Please note that the terms are not in any particular order, so you will need to organize them within the contract.

1. Salesmanis will have a minimum quote of 5% above the previous year's sales in his territory and a goal of 15% above that amount. Salesmanis will also be required to work full-time selling and promoting Martins' products, fulfilling

the present and future needs of Martins' customers in his territory, and expanding Martins' client base.

2. Salesmanis' exclusive territory will be the Riga metropolitan area.
3. Salesmanis' commission will be 10% of the net price of goods or installation services. However, he will not be entitled to a commission on any freight charges paid by the customer.
4. Martins' wants to reserve the right to service directly its two existing major accounts in Salesmanis' territory: Peteris Printing Company and Anda's Accounting Firm. Salesmanis will not get any commissions on sales to those two customers.
5. Salesmanis must agree not to handle the products of any of Martins' competitors durng the term of the agreement.
6. Martins wants a covenant not to compete that would take effect on the termination of the agreement and bar Salesmanis from working for any of Martins' competitors for three years after the agreement ends.
7. The agreement should have a one-year term starting January 1, 2003. It should be automatically renewable unless either party gives notice of an election not to renew at least 30 days prior to termination. On termination of the agreement, Salesmanis should return all catalogs, price lists, and samples to Martins.
8. Martins agrees to forward all customer leads in the territory to Salesmanis However, if Direktors feels that Salesmanis is not pursuing a lead aggressively enough, Martins can give Salesmanis three days notice, and, if Salesmanis still doesn't pursue it aggressively enough, Martins can then deal directly with the customer.
9. Martins has the right to terminate the agreement immediately upon notice to Salesmanis for any of the following reasons:
   a. Salesmanis' failure to meet his quota;
   b. Theft, fraud or embezzlement by Salesmanis;
   c. Salesmanis' conviction of a crime;
   d. Salesmanis' breach of the agreement;
   e. Salesmanis' violation of any of the company's rules or procedures
10. Martins will bill all of Salesmanis' customers directly, and retains the right to approve credit and set credit terms.

Martins Direktors has asked you, as Martins' attorney, to draft a Sales Representative Agreement that includes all these provisions.

1. Begin by organizing and preparing an outline of all the clauses to be included in the contract.
2. You should also suggest additional provisions that you think are appropriate.

Section L: Drafting Exercise: Employment Agreement

Your client, Paint Products, Inc. (PPI) a corporation headquartered in Detroit, Michigan, United States of America, manufactures and distributes several types of paints and coatings to industrial, commercial and retail customers throughout the United States and Europe. Altogether, PPI's products are sold in more than 25,000 stores. The company's most-widely distributed and successful product "Stay-Kleen Paint" is one of the leading sellers in the world.

PPI has recently hired Dr. Karlis Kimikis, a well-known chemist, to work in the company's Riga laboratory to develop a paint to protect metal from rusting. At least one other company is trying to develop a similar product. Both companies offered Dr. Kimikis a job, but he chose to work for PPI because it offered him more money.

PPI wants you to draft an employment agreement for Dr. Kimikis. Company officials want you to include the following provisions in the contract:

1. Kimikis is to work at PPI's laboratory located in the city of Riga, Latvia.
2. He is to devote his best efforts to developing the new paint that can protect metal from rusting.
3. He should not have any other job.
4. He will be salaried the first year at 50,000 lats.
5. Should he leave the company's employment for any reason, he should be precluded from working for any competitor for 5 years.
6. PPI wants Dr. Kimikis to agree to assign to PPI all rights to anything that he develops during his employment with PPI, including products other than rust-proofing paints.

Part 1. Prepare an index of the terms of the employment agreement between Paint Products, Inc. and Kaspars Kimikis.

Part 2. Refer to the Employment Agreement in Appendix I and complete the following exercises.

1. The "Modification" section is missing from the attached sample contract. Draft the missing provision.

2. Revise the Employment Agreement in accordance with the principles addressed in this course.

3. As you revise the Employment Agreement, how would you answer the following questions?:

   a. What language would you use to describe the employee's "best efforts"? Is that phrase adequate? What does it mean?
   b. How should the provision regarding competition be worded to best express your client's wishes?
   c. How should you draft the provision regarding Kimikis' assignment of rights to the company?

<u>Total possible score: 35 points</u>

Section M: Drafting Exercise: International Sale of Goods

INTERNATIONAL SALE OF GOODS I: **SCENARIO**

- The Latvian company, Gaisma SIA, (the buyer) has agreed in principle to a sales contract with the US Company, Lights for all Seasons Inc., (the seller) to buy 100,000 strands of Christmas lights.
- They have other deals in the pipeline and want to make their own standard form of contract, drawing on the CISG and INCOTERMS 2000.
- Although exact terms have still to be negotiated, the matter is already urgent.
- The lights are to be shipped from China.
- The strands cost $2 per unit and the total purchase price is $200,000.
- Gaisma has already agreed in principle to resell the lights to a European distributor, provided the lights can be shipped from China by 17 October, to ensure arrival in time for the Christmas market.
- If they are shipped later, a penalty clause is enacted and the purchase price is reduced. The lights are being resold for $3 per unit.
- Therefore, the deadline for drafting the contract is 13 October.

Now divide into your groups: representatives of Lights for All Seasons (seller) and representatives of Gaisma SIA (buyer), to agree terms and draft the contract.

Everyone receives an information pack including the following:

I. CISG (Document file III)
II. INCOTERMS 2000 – (Document file X)

TASK I: PREPARATION: read the documents and decide on the best approach to the negotiation. Group leaders assign roles and tasks.

TASK II - NEGOTIATION: do a deal with the other side.

TASK III – CONTRACT DRAFTING: finalize agreement on contract terms with the other side. Agree terms and draw up agreement.

TASK IV: PRESENTATION: be ready to explain and discuss contract clauses

Section N: Further exercises

FURTHER EXERCISES 1

Read the text below and think of the word that best fits each space. Use only **one** word in each space. There is an(*) *example* at the beginning. ***Total possible score: 10 points.***

CONTRACT LAW: REMEDIES FOR BREACH OF CONTRACT

When considering damages as a remedy for breach, the purpose of damages is to … *(*compensate*), to put the claimant back in the position that they would have been in if the contract had been carried out. However, this is subject to the rules on (1)………… of damage that govern the kind of loss for which a claimant ought to be compensated. For example, they may recover only on damage as may fairly and reasonably be considered as (2)…………… naturally from the breach. Any losses (3)……………… that were outside the parties' contemplation at the time the agreement was made will not be recoverable.

An injured party is also required to (4)…………….. or reduce their loss, which basically means that they have to take steps to minimize the negative effects of the breach. For example, if a supplier has failed to deliver goods, then the buyer ought to buy similar goods from another source reasonably quickly. This is a question of causation – if losses were (5)……………… to the claimant then they should not be recoverable from the defendant.

Sometimes the parties to a contract will attempt to see in advance the effect of possible breach and make (6)……………. for it. A fixed sum agreed in advance as the sum payable in the event of breach is called (7)……………….. damages. This term also refers to costs that can be quantified. If such a sum has been agreed in advance, then this is the amount that the court will award in accordance with the terms of the contract – provided it is a genuine pre-estimate of loss, and not a (8)…………..

Where damages would not be an adequate remedy, then (9)…………… performance may be granted. This is an order requiring the defendant to carry out their obligations under the contract. It is particularly applicable to contracts concerning the sale of land where damages are not considered an appropriate remedy. It will not be granted in a contract for personal services, or in a contract of continuing obligation, as the court cannot (10)………… such an agreement.

Moreover, another equitable remedy exists that requires a person not to break their contract. This order from the court may be used to prevent a threatened breach, or to enforce a negative stipulation in a contract of personal services. This is known as an (11)………………..

FURTHER EXERCISES 2

Read the sentences below and think of the **word or expression** that best fits each space. There is an example (*) at the beginning. ***Total possible score: 9 points.***

Example: *(*) Specific performance may be granted by the court in cases of breach of contract where damages would be inadequate compensation. The effect of the order would be that the party in breach must perform their obligations under the contract.*

12. A possible remedy for breach of contract is (13)………………… This aims to return the parties as far as possible to their pre-contractual position.

13. The buyer signed the contract because he believed the seller of the hotel, who said that business was always good during the summer. Unfortunately, this statement turned out to be a total (14)……………….. and the buyer decided to seek damages on that basis.
14. In order to create a valid contract, it is essential that all parties actually have (15)……………….. to contract. For example, if one of them is a minor then the contract could be ruled void.
15. In order to be valid and legally binding, an English contract must have (16)……………… This can be money, goods, services, or a promise to do something. Without this gain by one party and detriment to the other, there can be no contract.
16. The final version of a contract, where it is printed on special paper and is ready for the client to sign, is known as the (17)………………
17. Where no express, written contract is made, the court may decide that an (18)……………….. contract exists. This type of contract may be seen from the behaviour of the parties.
18. A Mareva injunction is a court order that prevents a person taking their assets out of the country until they have paid their debts. It is now known, more helpfully, as a (19)………………. order.
19. The contract was declared (20)………………… This means that a person who did not have capacity to sign the contract can end the contract if they choose to do so.
20. The consignment of cloth was (21)……………………. by customs officials, who refused to release it until the correct amount of duty was paid.

FURTHER EXERCISES 3

Read the text below on the subject of consideration in common law contract law, and decide which answer – A, B, C, or D - best fits each space. Choose only **one** word in each space. There is an *example* (*) at the beginning. ***Total possible score: 10 points.***

THE DOCTRINE OF CONSIDERATION IN COMMON LAW CONTRACT LAW

A court looks for several elements in deciding whether a legally *(A. obligatory B. compulsory C. requisite D. *binding*) contract exists. As well as seeking a matching offer and (21 A. receipt B. object C. recognition D. acceptance), the court also looks for consideration and, in certain situations, a clear intention to create legal relations.

The idea of consideration is one of the defining features of English contract law. No matter how much the (22 A. parts B. parties C. participants D. individuals) to an agreement may wish it to be legally enforceable, it will only be enforceable if it contains "consideration". Essentially, consideration is the term used to refer to what one party to an agreement is giving, or promising, in exchange for what is being given or promised from the other side.

It is sometimes said that consideration requires benefit and (23 A. detriment B. disadvantage C. harm D. damage). In other words, what is (24 A. endowed B. provided C. granted D. imparted) by way of consideration should benefit the person receiving it, whilst the giver loses something of value. However, the courts will not enquire into the "adequacy" of consideration. By "adequacy" is meant the question of whether what is made available by way of consideration (25 A. complies B. relates C. corresponds D. totals) in value to what it is being given for. Therefore, if I own a car worth USD 30K and I agree to sell it to you for USD 1, the courts will treat this as a binding contract. Consideration need not therefore be "adequate" but must be "sufficient". It must be something "which is of some value in the eyes of the law".

Consideration must also be given at the tme of the contract or at some point after the contract is made. On the other hand, it is not generally possible to use as consideration some act that has already taken place (26 A. prior to B. former C. aforesaid D. preceding) the contract. For example, if I give my friend my old car as a gift because he is poor and he then offers me USD 1K six months later, is that promise to pay enforceable? The answer is "No". That is because "past consideration" cannot be used to enforce a promise and I cannot (27 A. prosecute B. litify C. indict D. sue) on his promise to pay, as the element of (28 A. receipt B. return C. mutuality D. support) is absent.

An interesting question came before the court in the case of *Collins v Godfrey*. Can the performance of an act which the promisor is already under a legal obligation to carry out ever (29 A. total B. be equal to C. make D. amount to) consideration? Or would such consideratin be considered invalid on the (30 A. foundation B. grounds C. reason D. justification) that it was contrary to public policy.

FURTHER EXERCISES 4

Read the following sentences and put a preposition into each space. Use only **one** word in each space. There is an example (*) at the beginning. ***Total possible score: 10 points.***

Example: *My client cannot be held responsible for events that were not under her control.*

31. Our client informed yours that all the goods would be delivered ……. lorry on 21 June 2003.

32. The haulage company denied the allegations ………….. it, stating that it had performed all the terms of the agreement correctly and on time.

33. This Agreement will continue for five years unless terminated earlier in accordance ………….. clause 5.

34. Either party may terminate this Agreement ………… notice with immediate effect.

35. The term of this Agreement will continue unless terminated by either party ……... giving not less than three months' prior written notice.

36. The customer will notify the company …………. writing within five days of receipt of an invoice if the customer considers the invoice incorrect for any reason.

37. We will claim damages for breach of contract, to include a claim for interest …………. the rate of 6%.

38. Neither party will be liable for any delay ……….. performing or failure to perform its obligations under this Agreement due to any cause outside its reasonable control.

39. I confirm that clause 6 gives you the right to terminate the agreement by notice ………….. immediate effect.

40. The customer agrees that, except as expressly provided in clause 8 of this Agreement, the Company will not be …………….. any liabilility of any kind whatsoever in connection with this Agreement.

FURTHER EXERCISES 5

Read the text below and use the word in **bold** at the end of each line to form a new word that fits into the space in the same line. Use only **one** word in each space. There is an *example* (*) at the beginning. ***Total possible score: 10 points.***

It will sometimes be the case that a contract will include an (*) *exclusion* clause which will exempt one of the	***EXCLUDE***
(41)………………… from liability in the event of certain	PART
types of breach. This exclusion may be total or may simply (42)…………………. the parties' liability to a	UNLIMITED
(43)……………. sum of money. The problem is that many	SPECIFICATION
exclusion clauses are not of this (44)"……………….." type, as	VOLUNTEER
one party has little or no choice as to their inclusion. In such cases, the party (45)………………… upon them can obtain	UNRELIABLE
a very broad exemption in both (46)……………… and	TORTIOUS
contract. When these so-called (47)…………….. or unfair	EQUITY
clauses began to appear in the 19th century, the courts (48)…………. ways of limiting their effectiveness. More	DEVICE
recently, parliament has (49)……………….. to add a layer of	INTERVENTION
control on top of the common law rules. However, case law still (50)………………….. in all situations, whereas the statute may be irrelevant in certain cases.	APPLICATION

FURTHER EXERCISES 6

Read the text below and think of the word that best fits each space. Use only **one** word in each space. There is an example (*) at the beginning. ***Total possible score: 10 points.***

CONTRACT LAW: DURESS AND UNDUE INFLUENCE

This area of the law is concerned with situations where one of the parties to a contract has entered into an agreement that appears to be (*) *valid/enforceable/binding* but is later challenged because it is alleged that there has been unacceptabe pressure of some kind. This pressure could perhaps have taken the form of a physical threat, economic pressure, or even psychological influence. However, an obvious problem arises in establishing a legal action based on the last two categories – where does behaviour which has a perfectly acceptable place in legitimate business life become so unacceptable as to be considered against public (51)…………….. and on those (52)………………. be judged unenforceable.

Notably, the courts automatically presume that certain relationships give rise to undue influence. In these cases it is unnecessary for the party seeking to avoid the contract to prove their case, but rather the (53)……………………. of proof will be shifted on to the other party, who must show that no such influence operated. Evidence that the (54)……………………….. (we must include this word as nothing has yet been proved) influenced party only acted after seeking independent legal advice would probably be sufficient. Relationships falling into this (55)……………….. will include parent/(56)………………, doctor/patient, and lawyer/client. These are relationships where one party is extremely likely to (57)………………… upon the wishes or advice of the other, without seeking independent legal advice.

Many cases in relation to economic duress have been concerned with industrial action, and, even more (58)………………….., with trade unions. In the case of *Universe Tankships Inc v International Transport Workers Federation* (1983), the union blacklisted a ship owned by the claimants. The members of the union were told not to deal with th ship, and in order to continue with normal business the owners made a payment to the union's welfare fund. The company later (59)………………. an action to recover this payment under the rules governing duress. The court held that the unions's actions had exceeded reasonable industrial action, and the payment was (60)…………………………

FURTHER EXERCISES 7

Read the letter below that a lawyer wrote on behalf of a client to another lawyer. The letter is too informal in style and vocabulary.

Rewrite the latter in a more appropriate way. Do not change the meaning or lose any of the information it contains. ***Total possible score: 22 points.***

ZHULIK & VOR
ATTORNEYS AT LAW
ROOM 13
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A. Schuler
Shark Law Offices
12 Beacon House
Westferry Road
London, E1A 3JB

01 September 2003

Ref: Z-98-03

Dear A. Schuler

My firm works for Kravatco SIA, and they gave me the letter you wrote them about the contract with International Bedding. The date on the letter is 20 August 2003.

Kravatco says it's true that they had a contract with International Bedding to make a first order of 250 bedroom sets with a wood frame and this holds the mattress and storage places and side drawers and cupboards and lights, which Kravatco finished and sent it to London on 02 February. Kravatco also agrees that International bedding paid GBP 100,000 by bank transfer for the bed sets. But this is the only part of the letter that Kravatco says is true.

When International Bedding asked Kravatco to make the furniture, they looked at styles and designs together. International Bedding wanted a particular design that Kravatco thought wasn't good for everyone, especially people who are very fat or very active, and the design wasn't very strong. Kravatco told International bedding that the style and design were not a good idea but International Bedding said they had made up their mind that that was what their customers wanted.

So Kravatco made an example of the furniture and when it was finished International Bedding looked at it very carefully and were very happy with it. Again, Kravatco told them that the furniture was not strong enough for some people, but International bedding told Kravatco to go ahead with the rest and send it all as soon as possible.

The fact that some of the bed sets broke when people used them is not Kravatco's problem. Kravatco is sorry that some people had to go to hospital with broken bones etc., but it's not Kravatco's responsibility. They told International Bedding again and again that the furniture was a weak design. They won't pay back any of the money to International Bedding and they definitely won't pay them any money to cover their problem about people claiming for broken bones, etc. We don't think you have a good case to sue Kravatco, but if you do go ahead and sue them, we will fight you all the way.

Yours,
I. Zhulik

FURTHER EXERCISES 8

Read the following extract from a business sale agreement between two companies. The agreement is drafted in a highly formal style. For each space, decide which answer – A,B, C, or D – may best be used. There is an (*) *example* at the beginning. ***Total possible score: 10 points.***

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1. Sale and purchase of the business

1.1 Subject to the provisions of this agreement the Vendor shall sell with (* A. complete B. whole C. *full* D. total) title guarantee and the Purchaser relying inter alia on the Warranties shall purchase free from all charges liens equities and (63 A. cumbrances B. incumbrances C. burdens D. passives) with effect from the Transfer Date the Business as a (64 A. succeeding B. effective C. continuing D. going) concern (65 A. comprising B. making C. using D. constituting) the following Assets of the Vendor used in the (66 A. conduct B. management C.perform D. control) of the Business:

1.1.1 the (67 A. goodness B. good reputation C. good opinion D. goodwill)

1.1.2 the Property

1.1.3 the Plant and Equipment

1.1.4 the Stocks

1.1.5 the benefit subject to the burden of the Contracts so far as the Vendor can (68 A. sell B. transfer C. give D. assign) the same

1.1.6 the benefit subject to the burden of the Leased Plant and Equipment on the terms contained in clause 13

1.1.7 the Industrial Property Rights

1.1.8 all lists data and particulars of suppliers clients and customers sales and stock records price lists catalogs sales literature and (69 A. hype B. publicity C. promotion D. exposure) material of the Business and all other documents relating to the Business as the Purchaser may reasonably require to enable it (70 A. well B. effectively C. efficient D. usefully) to carry on the same in succession to the Vendor

1.1.9 all rights and claims of the Vendor against third parties (including without (71 A. limitation B. restraint C. constraint D. control) all rights in connection with such third parties' guarantee conditions (72 A. indemnitations B. indemnifices C. indemnities D. indemnifies) warranties and representations) with respect to the Business so far as the Vendor can assign the same other than as comprised in the Excluded Assets

1.1.10 without in any way limiting the generality of the foregoing all other assets (if any) of whatever nature employed in the Business at the Transfer Date but excluding the Excluded Assets

FURTHER EXERCISES 8

Read the extract below. The origin of the extract is given. Redraft the extract in order to make it more easily understood by the client. ***Total possible score: 10 points.***

REDRAFTING SKILLS

From a company's terms and conditions of sale

The Customer shall make payment in full and without any deduction or withholding whatsoever on any account within thirty days of the expiration of the month in which the invoice is dated or some later date following invoicing which must be expressly evidenced in writing as having been agreed between the Company and the Customer and should the payment not be received in full when due there shall accrue interest on the outstanding residue at the rate of 5% per annum above the base lending rate of ABC Bank plc from time to time which shall be payable by the Customer.

FURTHER EXERCISES 9

Read the text below and use the word in **bold** at the end of each line to form a new word that fits into the space in the same line. Use only **one** word in each space. There is an *example* (*) at the beginning. ***Total possible score: 10 points.***

Some contract terms are more important than others. The English (*) *law* makes a clear distinction between	***UNLAWFUL***
(74)…………………, or the major terms, and warranties, the	CONDITIONAL
less vital terms. If a major term is broken then the (75)…………………. party may refuse to continue with a	INJURY
contract at all. However, if a warranty is (76)…………….	BREACH
then they will have to go on with it but perhaps expect to receive (77)……………….. depending on the	DAMAGE
(78)………………… of the loss suffered.	EXTENSION
Very often, the courts will be called upon to place a (79)……………… upon the term "condition", and this will	CONSTRUE
often depend upon the (80)…………….. the breach has had	EFFECTIVE
upon the (81)………… , or plaintiff, as they are sometimes	CLAIM
known. Even where a major term has been breached, the result must not be (82)……………….. in the eyes of the court,	TRIVIA
otherwise there will be no (83)………………….. in law.	DRESS

FURTHER EXERCISES 10

Reply to the following email.

Total possible score: 10 points.

To: lawclinic@rgsl.edu.lv
From: confused@needhelp.com
Subject: What does this mean?
Attachments: Extract from Loan Agreement

Hi
Remember Clause I of the business sale agreement? Well, I've attached another part of the same agreement. Please email explaining what the clauses mean in plain English and in particular, explaining the words that I've underlined.

Thanks for doing this – that's at least two beers I owe you!
Tiit

Attachment

9. Contracts
9.1 The Purchaser agrees with the Vendor with effect from the Transfer Date to assume the obligations of and become entitled to the benefits of the Vendor under the Contracts and the Purchaser shall carry out perform and complete all the obligations and liabilities created by or arising under the Contracts (except for any obligations or liabilities attributable to a breach on the part of the Vendor or its employees agents or sub-contractors) and shall indemnify the Vendor and keep it fully indemnified against all liabilities losses actions proceedings costs claims demands and expenses brought or made against or incurred by the Vendor in respect of the non-performance or defective or negligent performance by the Purchaser of the Contracts.
9.2 The vendor shall on Completion and with effect from the Transfer Date assign to the order of the Purchaser or procure the assignment to the order of the Purchaser of all the Contracts which are capable of assignment without the consent of other parties.
9.3 In so far as any of the Contracts are not assignable to the Purchaser without the agreement of or novation by or consent to the assignment from another party this agreement shall not constitute an assignment or attempted assignment if such assignment or attempted assignment would constitute a breach of the same. In the event that consent or novation is required to such assignment:

9.3.1 The Vendor shall at the Purchaser's request and cost use reasonable endeavours with the co-operation of the Purchaser to procure such novation or assignment as aforesaid

9.3.2 Unless and until any such Contract shall be novated or assigned as aforesaid the Vendor shall hold the same in trust for the Purchaser and its successors in title to the Business absolutely and the Purchaser shall (if such sub-contracting is permissible and lawful under the Contract in question) as the Vendor's sub-contractor perform all the obligations of the Vendor under such Contract.

FURTHER EXERCISES 11

Read the text below and use the word in **bold** at the end of each line to form a new word that fits into the space in the same line. Use only **one** word in each space. There is an *example* (*) at the beginning. ***Total possible score: 10 points.***

In order to create a legally valid, (*) *binding* contract, both	***BIND***
parties must be deemed as having (85)…………………, that	CAPABLE
is, they must be recognized by the law as being allowed to enter into enforceable contracts. Children, or (86)……………	MINORITY
as they are sometimes known, have a very limited ability to enter into (87)……………. relations, a point of view that is	CONTRACT
largely intended to protect them from the (88)……………….. of their own actions.	CONSEQUENT
There are one or two (89)………………… to this rule,	EXCEPT
however. For example, if a contract of employment is considered by the court as being (90)……………… to the	BENEFIT
child, then there is a possibility that it will be enforced. Similarly, if (91)…………….. goods or services are the subject	NECESSARILY
of the contract, then there could be the same (92)…………. if the young person decides that they do not want to keep to the	COME
(93)……………….. they have made. The question of a	UNDERTAKE
child's (94)………………….. in tort is similarly complicated.	IMMUNE

FURTHER EXERCISES 12

Read the extracts below. Redraft the extracts in order to make them more easily understood by the client. ***Total possible score: 40 points.***

Original term: This Agreement and the benefits and advantages herein contained are personal to the Member and shall not be sold, assigned or transferred by the Member.

New term: *Membership is not transferable.*

Original term: The agreement shall determine forthwith if a receiving order is made against Hirer (or being a company Hirer goes into liquidation, whether voluntarily or compulsorily) or if Hirer shall call a meeting of his creditors or any distress or execution is levied against any of his goods

New term:

Original term: Maples will indemnify the Customer in respect of any direct damage to property caused by the negligence of Maples or the negligence or wilful default of its servants or agents.

New term:

Original term: Lessor shall not be liable for loss of or damage to any property left, stored or transported by Hirer or any other person in or upon Vehicle either before or after the return thereof to Lessor. Hirer hereby agrees to hold Lessor harmless from, and indemnify Lessor against all claims based on or arising out of such loss or damage unless caused by the negligence of Lessor.

New term:

Original term: Title to property in the goods shall remain vested in the Company (notwithstanding the delivery of the same to the Customer) until the price of the Goods comprised in the contract and all other money due from the Customer to the Company on any other account has been paid in full.

New term:

In-Class Exercises: Analyzing and criticizing contracts

Apply the theory from this course in analyzing and criticizing one of the following:
Maximum possible 35 points

1. Loan Agreement (p. 89).
2. Draft online banking contract (p. 107)
3. Car rental agreement (p. 113).
4. Distribution agreement (p. 122).
5. Leases (pp 129 and 134).
6. Draft agency agreement (p. 147).
7. Draft procurement contract (p. 151).
8. Draft share purchase agreement (p. 163).

Notes